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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-991

OTTER TAIL POWER COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR APPELLANT OTTER TAIL POWER COMPANY

Opinion Below

The opinion of the district court is reported officially at 331 F. Supp. 54 and unofficially at 1971 TRADE CAS. ¶ 73,692.

Jurisdiction

The jurisdiction of this Court is conferred by the Expediting Act § 2, 15 U.S.C. § 29, 32 Stat. 823 (1903). The district court entered its original Judgment on October

22, 1971. Appellant moved, *inter alia,* to amend such Judgment (A. 134-204),[1] and an amended, final Judgment was accordingly entered on November 10, 1971. (A. 207-210). A timely Notice of Appeal was filed in the District of Minnesota, Sixth Division, on December 7, 1971. (A. 211-212). The district court's Amended Judgment has been suspended during the pendency of this appeal. (*See* Dec. 7, 1971 order in the record). Otter Tail filed its Jurisdictional Statement with this Court on February 4, 1972. On May 1, 1972, the government served a memorandum conceding that the issues involved in this case are "novel" and "obviously important in the administration of the Sherman Act and its relation to the Federal Power Act." Probable jurisdiction was noted on May 22, 1972. 32 L. Ed. 2d 330, 40 U.S.L.W. 3556.

Statutes Involved

Subsections (a) and (b) of Section 202 of the Federal Power Act, 16 U.S.C. § 824a, provide:

> "(a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the [Federal Power] Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such inter-

[1] References to the Appendix are cited throughout as "(A.)."

connected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* that the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

Section 2 of the Sherman Act, 15 U.S.C. § 2, 26 Stat. 9 (1890), provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Questions Presented

1. Did the district court err in imposing on Otter Tail an absolute duty to sell at wholesale to all municipalities, without regard to the specific procedures and criteria which Congress provided in Section 202(b) of the Federal Power Act to govern determinations as to whether involuntary wholesaling should be ordered?

2. Did the district court err in requiring private utilities to wheel government power even though Congress has specifically and repeatedly determined that no such duty to wheel should be imposed?

3. Did the district court err in applying the Sherman Act to Otter Tail's efforts to influence the electoral decisions of municipal voters with respect to the public power issue?

4. Did the district court err in enjoining Otter Tail from the exercise of its constitutional right to petition the courts even though no suit commenced or supported by Otter Tail was found to be baseless or brought in bad faith and even though no such litigation has ever prevented the establishment of a single municipal power system?

5. Did the district court err in holding that Otter Tail is a "monopolist" solely on the basis of circumstances which are integral to the electric power business and without regard to the state and federal regulatory schemes which deprive Otter Tail of the very incidents of monopoly power that the Sherman Act prescribes?

6. Did the district court err in blindly applying mistaken *per se* concepts without regard to the special circumstances of the electric utility industry, the nature, purpose and policy of the pertinent regulatory scheme, and the adverse effects of its holdings upon producers and consumers of electric energy?

7. Did the district court err in holding as a matter of antitrust law (i) that a company must make its individually owned capital assets available for use by its competitors; (ii) that a company which is in the business of selling at retail must also sell at wholesale to competitors; and (iii) that it is illegal *per se* for a company to insist, when its property is used by others, that the property not be utilized to destroy its business?

Statement of the Case

1. *Otter Tail's Business and Service Area*

The Otter Tail Power Company ("Otter Tail") is in the business of supplying electricity at retail to consumers located in the small towns[2] and countryside of western Minnesota, eastern North Dakota, and northeastern South

[2] 440 of Otter Tail's 465 towns have populations under 1,500. Only 25 have a population of 1,500 or greater, and only three have a population in excess of 10,000, with the largest (Jamestown, North Dakota) having a population of about 15,000. (A. 661; DX-95, Sch. 4, A. 933-938).

Dakota. (A. 658-664; DX-95, Schedules 1, 4, 5 and Chart I, A. 933-938; DX-39, A. 610, 611). While the district court found that Otter Tail serves 465 of the 615 towns in this region considered by the court, and thus "possesses monopoly power" (A. 33, 34; Finding 187, A. 87, 88), the populations of these towns vary from a high of 29,687[3] to a low of 20 persons.[4]

Based on actual retail sales—rather than counting variously sized towns as though they were fungible units—Otter Tail's market share is only 28.9% of the total in the geographic market area as a whole.[5] The remaining 71.1% is accounted for by the retail sales of rural electric cooperatives, municipal systems, federal agencies, and other investor-owned utilities. (DX-94, A. 1201-1208; A. 873-876, 912-916).

Despite the modest size of its business,[6] by painstaking effort over a period of more than 60 years, Otter Tail has created for the consumers whom it does serve, an integrated electric power system capable of furnishing economic and reliable service to this thinly populated part of rural America. (A. 658, 659).

Otter Tail is a regulated utility under Part II of the Federal Power Act. It is also regulated by the State

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[3] Moorhead, Minnesota (not served by Otter Tail). DX-94, p. 4, A. 873, 1204. (Population from 1970 Census).

[4] Sibley, North Dakota (served by Otter Tail). GX-2, p. 4, A. 241, 285-286; Dep. GX-287, p. 127, A. 280, 286, 661; DX-95, Sch. 4, A. 933-938. (Population from 1970 Census).

[5] The relevant geographic market is Federal Power Commission Supply Area 26, which corresponds generally with the outer limits of the area served by Otter Tail's system. (DX-94, p. 4, A. 872-874, 1204; Finding 186, A. 87).

[6] For example, Otter Tail's installed generating capacity is only 241,165 KW. In comparison, the installed generating capacity of Potomac Electric Power Company, the utility which serves Washington, D.C., is 3,708,050 KW—more than 15 times as much. FPC, STATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE U.S. FOR YEAR ENDED DECEMBER 31, 1970 at 703, 718.

Public Service Commission of North Dakota[7] and by municipal bodies in Minnesota[8] and South Dakota.[9]

Under applicable state law, Otter Tail generally operates pursuant to municipal franchises which expire every 10 or 20 years. (A. 697, 698; A. 936; Dep. GX-287, pp. 19, 25, A. 280-286; A. 30). Since the 1940's there have been municipal power factions in various towns which have advocated that Otter Tail's franchise be terminated and that the town in question serve itself by establishing its own, independent power system. (A. 28; A. 706, 707, 712-715; 807-812). The issue of municipal versus private power has been decided at the polls in each instance. A total of 22 elections have been held in 12 towns with various municipal electorates often reversing their previous vote either for or against public power. (GX-2, Answer to Interr. No. 2, A. 241, 285-286; Finding 180, A. 85). Nine of these 12 municipalities have thus far elected to remain with Otter Tail. (A. 806). Of the three which ultimately voted for municipal power, all are presently operating their own electric systems. (GX-84, Stips. 10, 11, 43-45, 58-60, A. 1104, 1113, 1116, 254-257, 285-286; Findings 46, 136, 137, 164, A. 58, 77, 83).

Although the government carefully investigated Otter Tail's activities with respect to all of the hundreds of towns which it has serviced over the past several decades,[10] the trial court dealt with only six municipalities in any detail—Elbow Lake, Minnesota; Colman and Aurora, South Dakota; and Hankinson, Finley, and Velva, North Dakota. (A. 50-85).

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[7] N.D. Century Code, Chs. 49-01 to -07,-09,-20 (1960), *as amended* (1971 Supp.).

[8] Minn. Statutes §§ 300.03-04, 454-041-043 (1969).

[9] S.D. Compiled Laws § 9-35-1 (1967).

[10] A good deal of the evidence which the government thus proffered was rejected by the district court as immaterial. (A. 484-487).

2. *Refusal to Sell at Wholesale and to Wheel*

The district court stated that the "basic issue" in this case is whether Otter Tail's refusal "to sell electric power at wholesale, and . . . to wheel [or transmit] electric power to municipalities it formerly served at retail, constitute a monopolization of commerce in violation of the [Sherman] Act." (A. 27). In fact, this issue relates to only two towns—Elbow Lake, Minnesota and Hankinson, North Dakota. None of the other municipalities considered below had any need for such services since alternative sources of wholesale power and transmission facilities were readily available in each instance.[11]

Elbow Lake, Minnesota (pop. 1,550) elected not to renew Otter Tail's franchise when it expired in 1960. (GX-84, Stip. 2, A. 1100, 254-257, 285-286; Finding 19, A. 52). Otter Tail nevertheless continued to serve Elbow Lake until that municipality's own generating and distribution system began operations in June, 1966. (GX-84, Stip. 10, 11, A. 1104, 254-257, 285-286). While the municipal power project was in its preparatory stages, Elbow Lake requested that Otter Tail support its efforts by furnishing electricity at wholesale or, in the alternative, that Otter Tail allow its transmission lines to be used to wheel subsidized, governmentally produced power to its former retail customers. (A. 37, 53, 57; GX-92, GX-99, A. 285-286). Otter Tail refused both requests on the ground, among others, that such support for municipal power ventures would lead to the erosion and eventual destruction of its own integrated system. (A. 703-717, 32).

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[11] Colman and Aurora, South Dakota, each secured a source of power from the Bureau of Reclamation. In each case, the electricity is wheeled to the municipality over the lines of the Sioux Valley Empire Electric Cooperative. (GX-84, Stips. 36-38, 44, 52, 53, 59; A. 1111, 1113, 1114, 1116, 254-257, 285-286; Findings 137, 165, A. 77, 78, 83; A. 365-369, 606, 607, 849, 850, 868, 869; DX-17, DX-18, DX-19, A. 1181-1183, 367, 368; Chart submitted by the United States, A. 1219, 670, 671, added to record by order dated July 5, 1972).

(*footnote continued on following page*)

In March, 1966 (some three months before its system became operational), Elbow Lake filed an application with the Federal Power Commission to compel Otter Tail to furnish the services which it had previously requested. (GX-84, Stip. 13, A. 1104, 1105, 254-258, 285-286; Finding 45, A. 58; A. 320, 321). On November 6, 1968, the FPC entered an order pursuant to Section 202(b) of the Federal Power Act, requiring Otter Tail to provide a short term interconnection and to sell electricity at wholesale as an emergency measure, in order to prevent overloading of Elbow Lake's generators.[12]

(*footnote continued from preceding page*)

While similar sources of power and transmission were available to Finley and Velva, North Dakota, both of these towns nevertheless elected to remain with Otter Tail. (GX-84, Stips. 68, 69, A. 1117, 1118, 254-257, 285-286; Findings 170, 171, 175, 178, A. 84, 85; A. 809-811, 865-868, 905-907; DX-93, A. 864; Chart submitted by the United States, A. 1219, 670, 671, added to record by order dated July 5, 1972). The witness called by the government to establish Otter Tail's purported "dominance" over transmission admitted that he had not made a study of any other towns (A. 607, 608, 613, 614), and the record contains no evidence that Otter Tail possessed such "dominance" with respect to any municipalities other than Elbow Lake and Hankinson. In fact, as shown below in the text, Otter Tail did not even have "dominance" as to these two towns since (i) both had recourse to the FPC to require Otter Tail to sell at wholesale, and (ii) both had other feasible alternatives available to them. (A. 559, 560, 562, 565, 566, 583, 584, 597-600, 614, 887-890).

In addition, the record affirmatively shows that Otter Tail owns only 8% of the total mileage of the electric lines in the geographic market area. (DX-91, A. 1196-1198; A. 855-858, 877). Electric lines of other suppliers proliferate the geographic market area and furnish competitive sources of power. (A. 862-872, 905; DX-92, A. 1199-1200, 864; DX-93, A. 864; *see also* A. 606-608, 614, 615, 696, 697, 699, 712-716).

[12] Village of Elbow Lake v. Otter Tail Power Co., 40 FPC 1262 (1968), 79 PUR 3d 259 (printed in Jurisdictional Statement at A-120-135), *aff'd*, 429 F. 2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

In a second opinion dated September 13, 1971 (A. 187-203), the FPC ruled that a long-term interconnection also would be in the public interest in Elbow Lake's case. (A. 190-194, 198).[13] The Commission made it clear, however, that it did not wish to encourage "improvident ventures" by other municipalities. (A. 191). It pointed out that Elbow Lake, while perpetuating Otter Tail's rates, had nevertheless incurred a financial loss, and that the new municipal system was of "doubtful reliability." (A. 191). The FPC also found "that Otter Tail is legitimately concerned about the possible erosion of its system." It thus stated:

> "If other communities were to follow Elbow Lake's route, and if, having miscalculated the results, they could expect to be rescued by overly generous interconnection terms, then Otter Tail's fears that it will lose its customers, seriatim, seem to us to be supported." (A. 191).

The FPC therefore formulated an order designed to provide assistance in the immediate case, but upon terms which would be "fair to Otter Tail and its customers" (A. 193), and would not encourage other municipalities to follow suit.

The fact of the matter is that Elbow Lake did not actually need wholesale power from Otter Tail or anyone else in order to establish its municipal power system. As initially approved by the electorate and ultimately implemented, that system is designed to itself generate all of the power needed by Elbow Lake consumers.[14] What

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[13] The FPC also ruled that it had no power to compel wheeling. (A. 193-194). *See* p. 5, *infra*. While Otter Tail has not challenged the Commission's determination that it furnish wholesale service, an appeal is presently pending in the Eighth Circuit with respect to one of the terms of the interconnection.

[14] GX-84, Stips. 6, 11, A. 1101, 1104, 254-257, 285-286; A. 888.

Elbow Lake thus exacted from Otter Tail in its proceeding before the FPC was a back-up source of energy to increase the reliability of a municipal plant which had already replaced Otter Tail as the sole supplier of electricity to the town's residents. While the use of Otter Tail's facilities may have provided the optimum means of achieving this result, the record shows that Elbow Lake could have accomplished the same end by providing its own interconnection (i) by an independent transmission line built either by the Village, or by the Missouri Basin Municipal Agency and operated in conjunction with local generation (A. 559, 560, 562, 565, 566, 583, 584, 614, 888, 889, 326-329), or (ii) via lines of the East River Electric Cooperative. (DX-5, A. 1178, 292; DX-99, A. 1211-1213, marked and received in evidence by order dated November 8, 1971; A. 889, 890, 907, 908, 562).

Hankinson, North Dakota (pop. 1,125) voted to establish a municipal electric system in October, 1963. (GX-84, Stip. 22, A. 1106, 254-257, 285-286; Finding 67, A. 63). Like Elbow Lake, Hankinson asked Otter Tail to supply electricity at wholesale and to wheel government power. (A. 37, 38, 63, 64, GX-117, A. 1130, 1131, 285-286). Otter Tail did not comply with these demands, and Hankinson accordingly applied first to the North Dakota Public Service Commission[15] and then, in 1966, to the FPC for an order compelling Otter Tail to render such services. (GX-132, A. 285-286).

In 1968 the composition of the Hankinson City Council changed with the election of a new mayor and councilmen

[15] The North Dakota Commission found that it had no power to grant the relief requested. (Finding 95, A. 69; GX-131, GX-140, A. 285-286). It is the FPC that has exclusive jurisdiction over interstate transmission and wholesale sales of electricity under Part II of the Federal Power Act. *See, e.g.,* Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 458 (1972). On the other hand, the North Dakota Commission has comprehensive power to regulate the sale of electricity at retail. (A. 699, 700).

opposed to municipal power. (A. 726, 351). As a result, the Council elected to terminate the FPC proceeding and to offer a new franchise to Otter Tail. (GX-84, Stips. 28, 29, A. 1108-1110, 254-257, 285-286; Findings 102-104, A. 70; A. 615; GX-311, pp. 36-42, A. 344). The city thus chose voluntarily not to pursue its Federal Power Act remedies as Elbow Lake had done.

Again, it should be noted that even without Otter Tail's facilities, Hankinson had three alternative sources of power available to it, the nearest being only 18 miles away. (A. 887, 597-600). The total cost of such power to Hankinson (including the expense of a connecting line) would have been 15 mills per kilowatt hour—a sum which the government's own expert admitted would have been "feasible" for Hankinson to pay. (A. 599-600).

In summary, the district court's finding of monopolization rests upon Otter Tail's refusal to sell at wholesale or wheel electricity to two towns. Both municipalities had alternative feasible means of obtaining power from other sources, albeit at a somewhat higher cost. One town (Elbow Lake) established its own municipal power system in 1966 without using Otter Tail's facilities. It then obtained two orders from the FPC requiring Otter Tail to sell to it at wholesale, first on a temporary and then a permanent basis. These orders were entered in 1968 and 1971, respectively, after the town had supplanted Otter Tail as the "monopolist" in the municipal "market" in question.[16] The second town (Hankinson) commenced the same type of FPC proceeding as had been successfully invoked by Elbow Lake, but then switched its preference

[16] This is the terminology used by the district court with respect to Otter Tail in the same circumstances. As indicated below at pp. 72-74, *infra*, it is Otter Tail's position that the use of such terms to describe the fact that a small town is generally served by a single supplier misconceives fundamental principles of antitrust.

from municipal to private power through the electoral process. Otter Tail is thus presently serving Hankinson consumers subject to the full and comprehensive regulation of the North Dakota Public Service Commission. In the cases of both Elbow Lake and Hankinson, the administrative procedures available to the towns under the Federal Power Act provided a perfectly adequate means of obtaining the very same relief which the instant antitrust action was intended to afford.

3. *Political Activities and Litigation*

Since the issue of public versus private power has been invariably decided at the polls, the struggle between the opposing factions in the various municipalities was generally conducted in the same manner as any other political campaign. The trial court admitted in evidence, over Otter Tail's objection, a mass of campaign material on both sides of the municipal power question,[17] and the opinion below reiterates the government charge that Otter Tail monopolized by "participating in local municipal power political campaigns." (A. 31-32).

In addition to such campaigning, the district court considered a number of lawsuits, often directly related to the

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[17] GX-112 A thru GX-112 M; GX-113 A thru GX-113 M; GX-142 A thru GX-142 M; GX-143 A thru GX-143 D; GX-178 A thru GX-178 C; GX-179 A thru GX-179 I; GX-201 A thru GX-201 C; GX-202 A thru GX-202 D; GX-292 A thru GX-292 O; GX-293 A thru GX-293 J; GX-420, GX-421; GX-168-170; GX-171, A. 1137, 1138.

The offers, statements of counsel, objections and rulings in this area appear in the record at the following places: A. 224, 225, 256, 260-263, 271, 272, 280-286, 482, 483, 487, 488.

After the court overruled defendant's objections to the campaign material, to make the record complete and without waiving the objections, the balance of the items of campaign material (all relating to Velva, North Dakota) which the government did not offer were identified, offered and received in evidence. DX-25 thru DX-37, A. 488-489, 482, 483.

electoral process, which Otter Tail brought or supported. Since neither Colman nor Aurora had any need for Otter Tail's wholesale power or transmission facilities, the lower court's finding of monopolization with respect to these towns is predicated entirely upon such litigation (as well as related political activities) rather than any refusal to sell at wholesale or wheel. The trial court also considered certain suits involving Elbow Lake and Hankinson. Except for the three actions referred to below where Otter Tail is indicated as a named plaintiff, these cases were brought by local citizens opposed to municipal power. Otter Tail's participation consisted of offering legal advice and/or financial assistance to meet the expenses of litigation. (DX-42 thru DX-87, A. 850; GX-105-106 A, GX-110, GX-131-140, GX-150-167, GX-186-198, A. 285-286, Dept. GX-287, pp. 159-169, 180-185, Dep. GX-289, pp. 34-36, Dep. GX-291, pp. 5-8, 14-16, A. 280-286).

a. *Lawsuits Involving Aurora, South Dakota*

State ex rel. Jensen v. *Rasmussen* was a mandamus action brought by a number of Aurora voters to enforce compliance with an initiative petition calling for a vote on a resolution to abandon the town's plan for establishing a municipal electric system.[18] Although they had originally refused to do so, the commencement of this suit prompted town officials to hold the requested election, thus making further litigation unnecessary. (DX-83-86, A. 850; Findings 159, 161, A. 82, 83; A. 363, 364).

Similarly, in *Otter Tail* v. *Town of Aurora* (DX-80, A. 850), the South Dakota Circuit Court held, *inter alia*, that the town could not purchase its own revenue bonds (which

[18] Aurora had first voted *against* municipal power (GX-2, p. 1, A. 285-286; Finding 141, A. 78; GX-318, pp. 25, 26, A. 359-361), but had reversed this decision in a subsequent election. (GX-2, p. 1, A. 285-286; Finding 144, A. 79; GX-318, pp. 36, 37, A. 359-361). Petitioners thus hoped that a third vote would restore the original determination.

would thus, in effect, be transformed into general obligations) without submitting such action to the electorate. (*See* Finding 153, A. 81; A. 362, 363). As that court stated, the bond issue was invalid since "a necessary election was never held." (DX-80, p. 4).[19]

b. *Lawsuits Involving Colman, South Dakota*

State ex rel. Strenge v. *Westling,* 130 N.W.2d 109 (S.D. 1964), involved another mandamus petition, this time to compel certain officials of the Town of Colman to hold an election as to whether a previously authorized bond issue should be rescinded. The court held for defendants on the ground that the 1961 statute which provided for such an election did not apply retroactively to a bond issue approved in 1960, even though the initiative petition was filed in 1963. A. 409; *see also* DX-64 thru DX-67, A. 850).

In *Otter Tail Power Co.* v. *City of Colman,* 121 N.W. 2d 483 (S.D. 1963), Otter Tail challenged certain irregularities in the manner in which a resolution favoring municipal power had been passed by the City Council and submitted to the electorate. The court held for the defendants, this time on the ground that a subsequent statute *did* apply retroactively so as to cure the defects in question. It may be noted that the legislation relied upon in this case was found insufficient to cure the defects successfully challenged in *Otter Tail* v. *Aurora, supra.* (A. 406-408; *see also* DX-60 thru DX-63, A. 850).

In addition to these actions against Colman and its officials, the town itself brought suit against Otter Tail to enjoin the installation of a small number of larger-sized

[19] While it rendered judgment in favor of the other plaintiffs on this ground, the court found that Otter Tail had no standing to sue since, although a taxpayer, it was not a "resident" of Aurora. (DX-80, p. 2, A. 850).

poles which Otter Tail contended were necessary to improve its distribution system. (DX-69, DX-70, A. 850; Dep. GX-288, pp. 23, 24, A. 280-286; GX-156, GX-157, A. 286). At consumer insistence, Colman ultimately stipulated that Otter Tail could install one larger pole especially needed to maintain service. (DX-71, DX-72, A. 850; Dep. GX-288, p. 24, A. 280-286; GX-158, GX-159, A. 285-286). Although the district court brushed aside this case, and a similar dispute involving Hankinson, as "minutiae" which should not be considered (A. 346-348), it subsequently adopted as a "finding" the government's incomplete and one-sided version of the facts. (Finding 124, A. 74).

c. *Lawsuits Involving Hankinson, North Dakota*

In *Anderson* v. *City of Hankinson*, 157 N.W. 2d 833 (N.D. 1968), a group of Hankinson taxpayers sued the city, charging, among other things, that expenditure of funds to compel Otter Tail to make its transmission facilities available for wheeling was unlawful because state law prohibited a municipality from leasing such transmission facilities without first obtaining the permission of the electorate. (GX-133, A. 286). This suit was successful at the trial court level, although the decision was ultimately reversed on appeal. (GX-136 A thru GX-138, A. 285-286).

For its part, in addition to the proceedings the city started before the North Dakota Public Service Commission and the FPC, Hankinson commenced a private antitrust suit against Otter Tail which it later abandoned after subsequent elections had changed the complexion of the town government. (GX-84, Stip. 29, A. 1110, 254-257, 285-286; A. 724-726).

d. *Lawsuits Involving Elbow Lake, Minnesota*

Otter Tail and an Elbow Lake resident brought an unsuccessful action against the town challenging certain misrepresentations and other alleged irregularities in connection

with the municipality's electric bond issue. *Otter Tail Power Co.* v. *MacKichan*, 270 Minn. 262, 133 N.W. 2d 511 (1965) (DX-42 A, B and C; DX-43, DX-44, DX-45, A. 850). The town then sued Otter Tail—equally unsuccessfully—for alleged damages claimed to have resulted from the first litigation. (DX-47, p. 1-5, A. 850). This time Otter Tail prevailed at both the trial court and appellate levels. *Village of Elbow Lake* v. *Otter Tail Power Co.*, 281 Minn. 43, 160 N.W. 2d 571 (1968). (DX-47, pp. 94-105, A. 850; DX-48, DX-49, A. 850).[20]

In addition to its damage action in the state courts and its proceedings before the FPC, Elbow Lake commenced an antitrust suit against Otter Tail in federal district court. This private action was continued pending the outcome of Elbow Lake's FPC proceeding. (DX-59; *see* DX-87, p. 3, par. E., A. 850).

In summary, Otter Tail brought or supported six actions against four towns (Aurora, Colman, Hankinson and Elbow Lake), no actions having been brought against either Finley or Velva. While the district court found that these litigations had been brought to prevent the establishment of municipal power systems, in fact no suit brought or supported by Otter Tail had any such effect.[21] As noted above, all of the towns which ultimately voted for municipal power (Elbow Lake, Colman and Aurora) presently have their

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[20] The Findings also refer to another Elbow Lake case which had been brought in 1950. After the municipality had prevailed in this action, it nevertheless elected to grant Otter Tail a new franchise in 1952. It was upon the expiration of that franchise in 1960 that the more current municipal power dispute in Elbow Lake began. (Findings 14-19, A. 50-52).

[21] While the mandamus action against Aurora succeeded in bringing about the desired election, the electorate chose to adhere to its decision in favor of municipal power. (Findings 159-161, A. 82-83). After Otter Tail's suit against Aurora established that the town could not purchase its own revenue bonds, the town succeeded in marketing its obligations lawfully to an outside buyer. (Findings 150-153, 155, A. 80-81).

own electric systems. (A. 614, 615; Chart submitted by the United States, A. 1219, 670, 671, added to record by order dated July 5, 1972).

Significantly, the trial court did not find that any of the suits were groundless or brought in bad faith. In fact, three of the six actions were at least partially successful[22]; and, of the three which were lost, the two cases involving Colman were clearly decided on technical, legal grounds of narrow compass. In the last case, involving Elbow Lake, the town's subsequent claims to having been damaged by the litigation were flatly rejected by the state trial and appellate courts.

The trial court similarly did not find that Otter Tail had any policy of litigating in every instance regardless of the merits. As previously indicated, no suits at all were brought with respect to Finley or Velva, although these towns also had initially elected to terminate Otter Tail's franchise. Furthermore, the uncontradicted testimony of Otter Tail's president established (i) that he personally made the decision as to whether to litigate in each instance, (ii) that the decision was based upon a careful assessment of the merits of the case in question, and (iii) that Otter Tail had no general policy as to litigation with municipalities. (A. 722-726; Dep. GX-287, pp. 283-284, A. 280-286).

The decision below fails to indicate the clearly political nature of most of this litigation. As the foregoing summary indicates, four of the six cases involved the failure of one or another town to hold an allegedly required election, two of these suits being mandamus actions to compel compliance with initiative petitions. Such actions were plainly ancillary to the more central, electoral battles at which the municipal power issue was in fact decided.

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[22] In addition to the two successful suits against Aurora, the taxpayers' action against Hankinson was successful at the trial court level, although reversed on appeal.

Finally, although the opinion below deals only with litigation instigated by private power advocates, as the preceding outline of the suits shows, municipal power advocates were at least equally free in invoking the aid of judicial and administrative tribunals in connection with these local controversies.

4. *Other Towns*

The only other towns which the district court examined in any detail in its Findings were Finley and Velva, North Dakota (pop. 809 and 1,241, respectively). (A. 83-85). In these cases, Otter Tail neither instituted litigation nor refused to interconnect or wheel electricity. The electorates in both towns simply reversed their earlier resolutions in favor of municipal power. All that Otter Tail was found to have done was to take action to improve service in both municipalities. (Findings 172, 177, 179; A. 84, 85).

In summary, of the six towns which the district court considered in any detail, three opted for, and now have municipal power (Elbow Lake, Colman and Aurora). Of the three which elected to remain with Otter Tail (Hankinson, Finley and Velva), two (Finley and Velva) are towns in which Otter Tail is accused of nothing more than having improved its service, and in the third (Hankinson) the electorate voted the municipal power faction out of control. Finally, it may be noted that all of the aforesaid municipalities which Otter Tail is now serving (Hankinson, Finley and Velva) are located in North Dakota where Otter Tail's retail business is thoroughly regulated by the State Public Service Commission.

5. *Voluntary Interconnection and Coordination Arrangements*

In 1955, Otter Tail entered into a contract with the United States Bureau of Reclamation whereby, upon specified terms and conditions, each party agreed to sell and exchange power and to provide wheeling services for the

other. (GX-67, A. 1054-1098, 253, 285-286; A. 676-679, 31). Among other things, Otter Tail agreed to transmit power to Bureau customers other than those located in municipalities which Otter Tail was itself serving at retail. (GX-67, par. 27(c), pp. 27, 28, A. 1078, 1079, 679-683). The Bureau has also entered into such agreements with various other utilities. (A. 693, 694). Otter Tail has likewise concluded substantially similar contracts with various rural electric cooperatives. (A. 688-695; GX-22, A. 979-1005, 286; GX-38, A. 1005-1017, 285-286; GX-39, A. 1018-1040, 286; GX-65, A. 1040-1053, 285-286; A. 42). In each case, the duty of Otter Tail and of the contracting cooperative to transmit power for the other is subject to the same kind of restriction. (A. 694, 695; Finding 224, A. 129).

Although the district court made no finding on the point, evidence adduced at the trial showed that the aforesaid contracts would not have been entered into without the provisions assuring the parties that their facilities could not be used to deprive them of existing customers. (A. 676-683, 688-695). Such voluntary interconnection and coordination arrangements, which plainly serve to assure "an abundant supply of electric energy . . . with the greatest possible economy and with regard to the proper utilization and conservation of natural resources . . .", are expressly encouraged by Section 202(a) of the Federal Power Act.

6. *Proceedings Below*

The government's Complaint, filed July 14, 1969, alleged that Otter Tail had monopolized and attempted to monopolize by (1) refusing and threatening to refuse to sell power at wholesale, (2) refusing and threatening to refuse to wheel and (3) "engaging in other activities designed to obstruct and defeat the attempt by municipalities to establish alternative local electric power system [sic]." (A. 28, 13, 14). In its Answer, Otter Tail admitted its refusal to sell at wholesale and wheel, but denied

that such conduct violated Section 2 of the Sherman Act. (A. 29, 17-21).

The case was tried on June 1 through June 14, 1971. Many of the operative facts were established by stipulation. (A. 29). The district court rendered its opinion on September 9, 1971, and entered its original judgment on October 22, 1971. Without considering the application of the Federal Power Act, it held that Otter Tail's refusal to sell at wholesale and wheel constituted monopolization (A. 27-40; 131-133); Otter Tail was accordingly enjoined from refusing such services to existing or proposed municipal power systems in the future. (A. 132). The court also found that litigation initiated or sponsored by Otter Tail had violated Section 2 (A. 40-42), and it enjoined Otter Tail from thereafter engaging in any litigation "for the purpose of delaying, preventing or interfering with establishment [sic] of a municipal electric power system." (A. 132). Finally, the district court found that Otter Tail's contracts with the Bureau of Reclamation and various rural electric cooperatives were illegal *per se* because the parties did not undertake to wheel power to their own retail customers. (A. 43-45). The Judgment accordingly prohibited Otter Tail from entering into or enforcing any such agreements. (A. 132).

On October 27, 1971, Otter Tail moved for a new trial or, in the alternative, for amended and/or additional findings of fact and conclusions of law, and to amend the Judgment. (A. 134-204). Among other things, Otter Tail brought to the court's attention the Federal Power Commission's decision of September 13, 1971 which had granted Elbow Lake a long term interconnection. (A. 137-142, 187-203). The district court amended its Judgment on November 10, 1971 by adding the proviso that Otter Tail would not be compelled "to furnish wholesale electric service except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission."

(A. 205-206, 209). The Amended Judgment did not, however, allow the FPC any discretion as to the threshold question of whether the public interest required that wholesale or wheeling service be compelled at all in a given case.

SUMMARY OF ARGUMENT

The fundamental error of the decision below lies in its repeated and consistent disregard of Congress' intent concerning both the wholesale sale and transmission of electric energy and the proper application of antitrust.

With respect to the interstate transmission and wholesale sale of electricity, Congress enacted Part II of the Federal Power Act, a regulatory statute dedicated to the objective "of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. . . ." The duty of achieving this aim is expressly entrusted to the Federal Power Commission. As to involuntary wholesale sales in particular, Section 202(b) of the Act provides that such transactions may be ordered by the FPC, upon notice and hearing, if the Commission finds that such action would be in the public interest and that certain specified criteria (*e.g.*, that the sale would not impose an "undue burden" on the utility) are met. Totally ignoring these statutory procedures and standards, the lower court held that the antitrust laws impose an absolute duty upon a utility to sell at wholesale in all cases, regardless of the circumstances. In so ruling, the district court has deprived the FPC of a crucial element of its jurisdiction and has effectively nullified the regulatory scheme which Congress provided to govern the specific subject matter of compulsory wholesale sales.

The lower court's holding that the Sherman Act requires a private utility to transmit ("or wheel") government power to municipalities is, if anything, even more repugnant to Congress' intent, since here Congress specifically determined that no such duty should be imposed at all. Indeed, when it enacted Part II of the Federal Power Act in 1935, Congress deliberately eliminated two proposed sections that would have imposed the same legal duty which the lower court has created of its own accord in the case at bar. Since 1935, the issue which the court below purported to resolve has been the subject of intensive legislative debate. However, while numerous proposed wheeling bills have been introduced in the 88th through 92nd Congresses, Congress has consistently elected to stand by its earlier determination that forced wheeling would be inimical to the national interest. The decision below thus represents an improper attempt to reverse Congress judicially and to usurp its role in deciding important matters of national policy.

The district court again contravened Congress' intent, as well as this Court's decisions in *Noerr* and *Pennington*, by applying the Sherman Act so as to interfere with local political controversies and to deprive Otter Tail of its constitutional right to petition. The decisions which Otter Tail is accused of having sought to influence in this case are all basically political in nature, with the citizens of each town indicating their choice as between public and private power by voting on this issue in municipal elections. The lower court thus considered a mass of political campaign material and reiterated in its opinion the government charge that Otter Tail had "monopolized" by participating in such political activities. Furthermore, proceeding upon the erroneous assumption that the right of judicial redress is not constitutionally protected, the lower court found that Otter Tail had "monopolized" by bringing or supporting some six lawsuits involving four towns. None of these actions was found to be base-

less or brought in bad faith (indeed three were at least partially successful), and none in fact prevented the establishment of a single municipal system. Nevertheless, on this basis, the court restrained Otter Tail from henceforth bringing or supporting any litigation, however meritorious it might be, to delay, prevent, or interfere with a municipal take-over of its retail business. This absolute injunction on the exercise of a constitutional right is plainly contrary to Congress' intent.

Finally, the district court misconceived fundamental antitrust principles and compounded its error by applying mistaken notions of *per se* illegality without regard to the special circumstances and regulatory framework of the electric utility industry. The court thus held that Otter Tail is a monopolist on the basis of circumstances which are integral to the electric power business, and without regard to the state and federal regulatory schemes which deprive a utility of the very indicia of monopoly proscribed by the Sherman Act, *i.e.*, the power to fix prices or exclude competition. The court further held—without any precedential basis whatsoever—that as a matter of antitrust law (i) a company must make its individually-owned capital assets available to municipalities which seek to replace it as a supplier of electricity; (ii) a company in the business of selling power at retail must nevertheless sell at wholesale if requested to do so; and (iii) it is illegal *per se* for a company to insist, when its property is used by another, that that property not be utilized to destroy its own business. While these notions would be erroneous in any circumstances, the application of such *per se* concepts to an industry regulated in accordance with specific public interest objectives of its own is especially inappropriate. The consequences of the lower court's holdings would be to impair service, to raise costs for consumers of electricity and to discourage the very kind of voluntary interconnection and coordination of facilities which Congress expressly stated should be promoted. In sum, the decision below

would produce both injustice and chaos in an industry whose proper functioning is essential to the national welfare.

ARGUMENT

POINT I

The Decision And Judgment Below Would Nullify The Regulatory Scheme Provided By Congress In Part II Of The Federal Power Act Specifically To Govern Involuntary Wholesale Sales Of Electric Energy.

In light of the government's admission that the issues at bar "are obviously important in the administration of the Sherman Act *and its relation to the Federal Power Act*" (Memorandum For The United States, p. 1; emphasis added), the fact that the trial court's opinion does not even mention the latter statute plainly shows the error of its analysis. In enacting Part II of the Federal Power Act, Congress clearly indicated its intent that refusals to sell electricity at wholesale be dealt with by the Federal Power Commission applying the criteria and utilizing the procedures explicitly set forth in the regulatory statute —not (as here) by a court applying the quite different standards of the antitrust laws.

Section 202(b) of the Federal Power Act provides that the FPC may order the interconnection of transmission facilities and/or the sale or exchange of electricity at wholesale "under certain circumstances." *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 423 (1952). The particular criteria which Congress specified for determining whether a wholesale sale may be compelled were paraphrased by this Court in *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S.

515 (1971). As stated therein, the FPC may enter a § 202(b) order:

> "... if the Commission 'finds such action necessary or appropriate in the public interest,' and 'if the Commission finds that no undue burden will be placed upon such public utility thereby.' The proviso to the section makes explicit that the Commission has no authority in ordering an interconnection 'to compel the enlargement of generating facilities . . . [or] to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.'" 402 U.S. at 521-522 (brackets in original).[23]

As demonstrated below, Congress plainly intended that § 202(b) should govern determinations as to whether a particular utility may be properly required to sell at wholesale in a given case. The decision below nullifies this regulatory scheme in disregard of Congress' intent, and should therefore be reversed.

A. The Federal Power Act Was Clearly Intended To Provide The Exclusive Means By Which A Regulated Utility May Be Required To Sell At Wholesale.

As early as *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), this Court established the principle that where Congress has created a specific regulatory scheme to deal with a given subject matter, the specialized administrative procedures provided thereby cannot be circumvented by judicial intervention based upon purported common law or antitrust principles. The plaintiff in *Abilene*, a shipper, asserted a common law claim for damages predicated upon the exaction of allegedly unreason-

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[23] Under the second sentence of Section 202(b), the FPC may prescribe the "terms and conditions" of a wholesale sale once it has made the threshold determination that the transaction should be compelled.

able railroad rates. Although the Interstate Commerce Act, by its terms, expressly preserved existing common law and statutory remedies (*see* 204 U.S. at 446), the Court held that:

> ". . . the recognition of such a [common law] right is wholly inconsistent with the administrative power conferred upon the Commission. . . . Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal . . . with power . . . not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future . . . if the power was left in courts to grant relief . . . without reference to previous action by the Commission in the premises." 204 U.S. at 440-441.

In *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), this same principle was held to bar an antitrust suit for treble damages predicated upon the exaction of rates which, although approved by the ICC, were alleged to have been fixed conspiratorially by the defendant-railroads. Writing for the Court, Justice Brandeis pointed out that if the alleged conspiracy resulted in rates which were unreasonably high or discriminatory, the plaintiff could claim damages in an administrative proceeding before the ICC. In such circumstances, the Justice found it incredible "that Congress intended to provide the shipper from whom illegal rates have been exacted with an additional remedy under the Anti-trust Act[.]" 260 U.S. at 162.

Similarly, in *United States Nav. Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), the Court held that a private antitrust plaintiff may not bring an action based on conduct covered by the provisions of the Shipping Act. Specifically, the Court said:

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections

> of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." 284 U.S. at 485.

These principles were reiterated and applied by Mr. Justice Cardozo, writing for the Court in *Terminal Warehouse Co.* v. *Pennsylvania R. R.*, 297 U.S. 500 (1936). Holding that a warehouse owner could not bring an antitrust action attacking an exclusive arrangement between the railroad and another warehouse, the Court said:

> "Certain then it is that the Anti-Trust laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. . . . For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive." 297 U.S. at 514.

In *Far East Conference* v. *United States*, 342 U.S. 570 (1952), which involved facts substantially similar to those in *Cunard*, the Court characterized as "firmly established" the principle:

> ". . . that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies

created by Congress for regulating the subject matter should not be passed over." 342 U.S. at 574.[24]

In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the government attacked, as violations of the Sherman Act, (i) an agreement dividing certain South American air routes between Pan American and Panagra (a corporation jointly owned by Pan American and Grace), and (ii) Pan American's alleged interference with Panagra's efforts to obtain the approval of the Civil Aeronautics Board for certain additional, competing routes from Central America to the United States. The CAB had itself requested that the Attorney General bring suit. Nevertheless, the Court found that the adminstrative remedies provided in the Civil Aeronautics Act barred an antitrust suit based upon the same subject matter. While noting that air carriers are not *per se* immune from antitrust, the Court said:

"The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 371 U.S. at 305.

The Court therefore held:

". . . that the [Civil Aeronautics] Act leaves to the Board under § 411 all questions of injunctive relief against the division of territories or the allocation of routes or against combinations between common carriers and air carriers." 370 U.S. at 310.

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[24] *Far East Conference* also authoritatively established that the availability of administrative procedures and remedies will bar an antitrust suit brought by the *government*, as well as foreclosing private treble damage actions. This issue had previously been left open in *Keogh*, *Cunard* and *Terminal Warehouse*. *See also*, *e.g.*, Pan American World Airways, Inc. v. United States, *infra*.

Again, in *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965), this Court rejected the plaintiff-bank's suit to enjoin the opening of a competing bank holding company subsidiary. The Court held:

> "[Congress] intended that challenges to [Federal Reserve] Board approval of the organization and operation of a new bank by a bank holding company be pursued solely as provided in the statute. This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. . . . Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design." 379 U.S. at 420.

The principles articulated in the foregoing decisions[25] are controlling in the case at bar. There can be no ques-

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[25] *See also, e.g.*, Baltimore & O. R.R. v. United States *ex rel.* Pitcairn Coal Co., 215 U.S. 481 (1910); Robinson v. Baltimore & O. R.R., 222 U.S. 506 (1912); Mitchell Coal & Coke Co. v. Pennsylvania R.R., 230 U.S. 247 (1913); Morrisdale Coal Co. v. Pennsylvania R.R., 230 U.S. 304 (1913); Texas & Pac. Ry. v. American Tie & Timber Co., 234 U.S. 138 (1914); Pennsylvania R.R. v. Clark Bros. Coal Mining Co., 238 U.S. 456 (1915); Loomis v. Lehigh Valley R.R., 240 U.S. 43 (1916); Northern Pac. Ry. v. Solum, 247 U.S. 477 (1918); Director General of Railroads v. The Viscose Co., 254 U.S. 498 (1921); Western & Atlantic R.R. v. Georgia Pub. Serv. Comm'n, 267 U.S. 493 (1925); Midland Valley R.R. v. Barkely, 276 U.S. 482 (1928); Board of R.R. Comm'rs v.

tion that the remedies and procedures of the Federal Power Act—like those of the Interstate Commerce Act, the Shipping Act and the Civil Aeronautics Act—are exclusive as to the matters which they cover. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). *See also Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414 (1952), where this Court held that a utility may not avoid prescribed Federal Power Act procedures by seeking "to utilize a violation of the Sherman Act so as to nullify a rate-reduction order." *Id.* at 423-424.

As to § 202(b) in particular, the FPC's authority under that section clearly covers the "precise ingredients" of the government's antitrust claim, *i.e.*, Otter Tail's refusal to sell at wholesale. *See Pan American World Airways, Inc.* v. *United States, supra; United States Nav. Co.* v. *Cunard Steamship Co., supra.* That section provides the procedure and criteria by which such involuntary wholesale sales may be ordered—in short, "a remedial system that is complete and self-contained" as to the subject dealt with. *See Terminal Warehouse Co.* v. *Pennsylvania R.R., supra.* It was plainly intended as a "carefully planned and comprehensive method" whereby the expert agency to which Congress has entrusted such matters might "explore and pass on the ramifications of a proposed [transaction]." *See Whitney National Bank* v. *Bank of New Orleans, supra.*

By the enactment of § 202(b), Congress has explicitly directed that compulsory wholesale sales should be ordered only on the basis of certain specific factual determinations and discretionary judgments which lie outside the scope of common judicial experience. In such circum-

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Great N. Ry., 281 U.S. 412 (1930); United States v. Western Pac. R.R., 352 U.S. 59 (1956); Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963); Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970).

stances, the FPC, as the expert agency created by Congress to deal with such matters, "should not be passed over." *Far East Conference* v. *United States, supra.* It is inconceivable that Congress intended any party—including the United States—to assert an additional, antitrust remedy whereby mandatory wholesale sales could be ordered on bases entirely different from those specified in § 202(b). *Cf. Keogh* v. *Chicago & Northwestern Ry., supra.* Indeed, it is difficult to imagine a case in which the assertion of such a right would be more "wholly inconsistent with the administrative power conferred upon the Commission...." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co., supra.*

In sum, a regulated utility such as Otter Tail may be ordered to sell at wholesale only by the FPC, in a proper § 202(b) proceeding, and not by a court applying the antitrust laws. The district court's decision to the contrary contravenes Congress' manifest intent and is therefore plainly erroneous.

B. The Decision And Judgment Below Are Repugnant To The Regulatory Scheme Which Congress Provided By The Enactment Of Part II Of The Federal Power Act.

1. The lower court found that Otter Tail "monopolized" by refusing to sell at wholesale to two towns, Elbow Lake and Hankinson. Both municipalities availed themselves of their prescribed Federal Power Act remedies. While Hankinson elected to renew Otter Tail's franchise, and thus withdrew its application with the FPC, Elbow Lake proceeded before the Commission and obtained first a temporary and then a permanent § 202(b) order requiring Otter Tail to sell at wholesale. Otter Tail has duly obeyed both of these administrative directives.

The putative antitrust violation involved in this case thus consists of Otter Tail's refusal to comply with the municipalities' demands *before* being ordered to do so in accordance with statutory procedures. In other words, in

the lower court's view, a utility which is presented with a demand for wholesale service must always comply immediately and of its own accord. If it seeks to have the matter resolved by the Federal Power Commission in accordance with § 202(b), it may do so only at the risk of invoking the full panoply of antitrust sanctions. Obviously, any interpretation of the antitrust laws which makes it a misdemeanor to rely upon Federal Power Act procedures is plainly repugnant to the latter statute.

2. The Judgment below requires Otter Tail to furnish wholesale power to any municipality which makes a demand, regardless of whether the FPC finds that the transaction may be properly ordered under § 202(b). In fact, municipalities in Otter Tail's service area may henceforth compel wholesale sales directly under the district court's Judgment, without the need for making any application to the FPC. While Paragraph V of the Amended Judgment purports to restore the Commission's authority under the *second sentence* of Section 202(b) to pass on the terms and conditions of such sales, the injunction still deprives the FPC of all power under the *first sentence* of that section to decide whether a mandatory sale should be ordered at all.

In *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515 (1971), this Court reversed a court of appeals modification of the terms of an FPC § 202(b) order and reinstated the Commission's decision. The Court held that:

> "... the Court of Appeals overstepped the role of the judiciary. Congress ordained that that determination [as to the terms of a § 202(b) order] should be made, in the first instance, by the Commission, and on the record made in this case, the Court of Appeals erred in not deferring to the Commission's expert judgment." 402 U.S. at 527.

If it is improper for a court of appeals to substitute its judgment for that of the FPC with respect to a single term of a § 202(b) order, surely it is indefensible for a district court to usurp entirely the FPC's more important role in determining whether a mandatory wholesale sale should be ordered in the first place.

3. In enacting § 202(b), Congress carefully provided that no utility may be compelled to sell at wholesale if such action would (i) impose an undue burden, (ii) require the enlargement of generating facilities, or (iii) impair service to existing customers. *See Gainvesville* v. *Florida Power Corp.*, 402 U.S. at 521-522. Ignoring these provisos, the district court has ordered Otter Tail to furnish wholesale power in all cases, even where compliance *will* impose an undue burden, require enlarged generation facilities or impair service. In lieu of the congressionally ordained scheme, whereby determinations as to mandatory wholesale sales are to be made on a case-by-case basis, in light of the particular facts involved in each instance,[26] the district court has entered a blanket injunction, requiring Otter Tail to furnish wholesale power to *all* existing and prospective municipal electric systems, regardless of the circumstances. It is difficult to conceive of a more direct contravention of Congress' intent.

4. Section 202(b) also provides that a wholesale sale may be compelled only upon a finding that such action is "necessary or appropriate in the public interest." This standard must be read in light of the purpose of Part II of the Federal Power Act, which is stated to be that "of assur-

[26] Significantly, the FPC may not initiate a § 202(b) proceeding on its own motion, but rather can only proceed upon an application duly made in a particular case. By structuring § 202(b) in this manner, Congress made it impossible for any utility to be subjected lawfully to a blanket order to sell at wholesale in all situations. Such an incongruous result could be achieved only by an order, such as the Judgment below, which is entirely outside of the procedures created by Congress.

ing an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. . . ." Federal Power Act § 202(a). The district court's utter disregard of this primary congressional objective is evident both from the Judgment itself and from the numerous disparities between the court's decision and those of the FPC in Elbow Lake's § 202(b) proceedings. For example, in its September 13, 1971 order, the FPC stressed the importance of not encouraging other municipalities to follow Elbow Lake with improvident power ventures of their own. (A. 191). The district court, on the other hand, has given all such ventures the strongest possible encouragement by proscribing utility opposition and, indeed, requiring utility support, by wholesale sales and wheeling, regardless of the circumstances. (A. 129-132). In its earlier interconnection order, the FPC declared Otter Tail's viability as a producer of electricity to be an element of the public interest. Jurisdictional Statement at A-131. For the district court, however, Otter Tail's survival—and the consequences of its failure for consumers—are utterly immaterial to a determination as to whether mandatory interconnection should be required. (A. 45).[27] In short, the district court reached its decision solely on the basis of its novel interpretation of the antitrust laws which it blindly applied to an electric utility without even considering the "public interest" under the Federal Power Act, or the need for a specialized, expert agency to apply this standard.[28]

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[27] The court and the Commission also disagreed on such basic evidentiary matters as whether an overly broad duty to sell at wholesale might in fact lead to the erosion and eventual destruction of Otter Tail's integrated system. While the court brushed aside Otter Tail's contentions in this regard (A. 45, 46), the FPC found that the utility was "legitimately concerned." (A. 191).

[28] It may be observed that if the Judgment at bar had been entered five years ago (rather than last year), the FPC would never have had the opportunity to pass on Elbow Lake's applications for

5. Section 202(b) requires that each state commission which will be affected by the FPC's order must be given notice and an opportunity to be heard. Under the district court's Judgment, the North Dakota Public Service Commission has been deprived of all such rights with respect to wholesale sales to North Dakota municipalities—some of which may be encouraged thereby to embark upon what the FPC has called "improvident" municipal power ventures. Thus, instead of the procedures that Congress has provided for promoting the coordination of federal and state regulatory efforts, the district court has substituted a one-sided regime of federal control predicated solely on antitrust considerations.

6. By the addition of Paragraph V of the Amended Judgment, the district court apparently recognized that only the FPC is competent to prescribe the rates and other terms and conditions for a compulsory wholesale sale. But, the power (a) to order a compulsory wholesale sale and (b) to determine the terms of the transaction, are integral parts of a single regulatory function. As this Court stated in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951):

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temporary and permanent interconnections under § 202(b). The FPC decision which this Court reinstated and affirmed in Gainesville Utilities Department v. Florida Power Corp., *supra*, would likewise never have been entered, since the utility in that case would presumably also have been under an absolute antitrust duty to interconnect. Thus no agency would have ever considered the "public interest" aspects of these transactions. This result is particularly incongruous with respect to Elbow Lake and Gainesville, which were both seeking back-up power allegedly needed to improve reliability. Thus, in addition to other § 202(b) factors, the FPC had to consider what the municipalities' needs actually were—a judgment requiring a great deal of expertise as to the reliability of electric systems under various circumstances. Presumably, a municipality in the position of Elbow Lake or Gainesville may, under the decision below, obtain such back-up power automatically, without any demonstration of need.

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion."

In the instant case, a determination as to whether a particular wholesale sale is in the "public interest" requires at least as much expertise and informed discretionary judgment as a decision concerning the terms of a transaction which has already been compelled. By excising the major portion of the FPC's jurisdiction, and requiring it henceforth to enforce the Judgment rather than the Federal Power Act, the district court has nullified Congress' intent that Commission expertise and statutory standards be brought to bear at the outset and with respect to the most crucial issues in a Section 202(b) proceeding.

7. The district court's decision invites concurrent proceedings before the courts and the Commission with respect to virtually all of the matters encompassed by the Federal Power Act. As noted above, Elbow Lake and Hankinson both commenced treble damage actions as well as proceedings before the FPC. *See* pages 16, 17, *supra.* Similarly, the matters dealt with by this Court in *Gainesville Utilities Department* v. *Florida Power Corp., supra,* are presently the subject of a private antitrust action. *See Gainesville Utilities Department* v. *Florida Power Corp.,* Civil No. 68-305-Civ. J. (M.D. Fla., filed Aug. 13, 1968). *See also Bartow* v. *Florida Power Corp.,* Civil No. 70-129-T (M.D. Fla., filed Apr. 6, 1970); *Borough of Pitcairn* v. *Duquesne Light Co.,* Civil No. 68-858 (W.D. Pa., filed July 23, 1968). In other words, in a proliferating number of cases the courts and the Commission must now rule concurrently on the same subject matter applying the differing standards of the Sherman Law and the Federal Power Act. In such circumstances, inconsistent determinations—such as those

which characterize the district court and FPC decisions here—are virtually inevitable. Further inconsistencies will undoubtedly also arise among the differing determinations of the various district courts. Plainly, Congress never intended that the orderly scheme of enforcement provided by the Federal Power Act should be replaced by a chaotic regime of duplicative proceedings.

In sum, the decision and judgment below are repugnant to the letter, spirit and purpose of the Federal Power Act. Such blatant disregard of Congress' intent is manifestly erroneous and should be reversed.

C. Congress Has Mandated That Decisions Regarding Compulsory Wholesale Sales Of Electricity Be Based Upon An Appraisal Of The "Public Interest" Within The Meaning Of The Federal Power Act.

The decision and judgment below make the policies and requirements of the antitrust laws of primary importance to a determination as to whether a utility should be compelled to sell at wholesale. This result, in the context of a regulatory scheme dedicated to its own, particular "public interest" objectives, is plainly contrary to this Court's holdings in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86 (1953) and *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963).

In *McLean Trucking* the Court reviewed an order of the ICC approving the consolidation of certain regulated motor carriers. The Justice Department attacked the ICC's decision for its alleged failure "to consider and give due weight to the anti-trust and other laws of the Unted States." 321 U.S. at 77. In upholding the Commission, the Court found that "the policies of the antitrust laws determine 'the public interest' in railroad regulation only in a qualified way." *Id.* at 83. Specifically, the ICC must base its decisions upon an assessment of the "public interest,"

which in turn incorporates the goals of the national transportation policy.[29] The Court concluded:

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. . . . 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' " 321 U.S. at 87-88.

In *RCA Communications,* the FCC had approved certain duplicative radiotelegraph circuits on the ground that competition was "reasonably feasible" in the circumstances. The Court (per Frankfurter, J.) reversed the Commission, holding that the FCC must determine that competition is not merely "feasible" but desirable in light of the purposes of the Federal Communications Act. A decision based simply on antitrust goals would deprive the public of the benefits of the FCC's expertise and would be contrary to Congress' intent that such decisions be based upon all factors relevant to the "public interest." 346 U.S. at 95.

In *Pan American,* this Court similarly pointed out that the words "unfair practices" and "unfair methods of com-

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[29] That is, the fostering of " 'a system of coordinated transportation for the Nation which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art.' " *Id.* at 82.

petition," when "transferred to the Civil Aeronautics Act, gather meaning from the context of that particular regulatory measure and the type of competitive regime which it visualizes." 371 U.S. at 308. The Court continued:

> "That regime has its special standard of the 'public interest' as defined by Congress. . . . It would be strange, indeed, if a division of territories or an allocation of routes which meet the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. . . . Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board. . . . If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Id.* at 308-310.

In the instant case, Congress has created a scheme of regulation dedicated to "assuring an abundant supply of electric energy throughout the United States with the greatest economy and with regard to the proper utilization and conservation of natural resources. . . ." Federal Power Act § 202(a). It has specifically directed that all determinations as to mandatory wholesale sales be based upon this "public interest" standard. Far from seeking to achieve antitrust goals, one of the draftsmen of the bill which became Part II of the Federal Power Act explicitly stated that "[t]he bill is not drawn upon the theory that competition shall be established in the industry."[30]

The decision below stands this congressionally intended scheme of regulation on its head. Otter Tail has been ordered to sell at wholesale to all municipalities based upon antitrust considerations alone, with no regard to the "public interest" goals of the Federal Power Act. The statutory objectives, and the expertise of the FPC, are permitted to play a role only secondarily in determining the terms of a previously ordered interconnection. This

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[30] Remarks of Solicitor DeVane, Addendum, p. 19 (hereinafter cited as "(Add.)"). *See also* Add. 17-18, 20.

result is plainly contrary to the law as articulated in *McLean, RCA Communications* and *Pan American.*

This is not to say that competitive consequences may not be considered in determining whether a particular compulsory sale is in the public interest. But the teaching of *McLean, RCA Communications* and *Pan American* is that competition is but one such factor in the "public interest" equation, and that a determination as to its proper weight and role may properly be made only by the expert regulatory agency, not the courts.[31] The district court is therefore doubly in error: first, because it based its decision solely on antitrust rather than Federal Power Act goals; second, because the court itself ordered Otter Tail to sell at wholesale rather than leaving such determination to the Commission. In both respects, the decision below is contrary to the expressed will of Congress and therefore erroneous.

D. The Question At Bar Is Not Whether There Is Any Express Exemption Or Implied Immunity From Antitrust, But Rather Whether Congress Intended The Provisions Of § 202(b) To Be Nullified By An Antitrust Suit Predicated Upon The Same Subject Matter.

The application of antitrust to particular conduct in a regulated industry depends, in each case, upon the intent of Congress. While it is true that "repeals by implication are not favored," *see, e.g., Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. at 437, antitrust has repeatedly been held not to apply "in cases of plain repugnancy between the antitrust and regulatory provisions." *United*

[31] Significantly, the FPC did consider the role of competition in the *Gainesville* case, where the defendant utility cited increased competition as a *negative* factor militating against the issuance of a § 202(b) order. The Commission, in a decision reinstated and affirmed by this Court (402 U. S. 515 (1971)), did not disagree that, in the circumstances of the case, increased competition would be contrary to the public interest; rather, it found as a matter of fact that such competition was unlikely to occur. Gainesville Utilities v. Florida Power Corp., 40 FPC 1227, 1239-1242 (1968).

States v. *Philadelphia National Bank*, 374 U.S. 321, 351 (1963). As demonstrated in Section A, such repugnancy has been found wherever Congress has provided statutory procedures and standards to govern specific subjects. In Sections B and C, we have pointed to the particular areas of repugnancy in the instant case between the lower court's construction of the Sherman Act and the regulatory scheme provided by Congress to deal with involuntary wholesale sales of electric power.

The issue at bar is thus totally unlike that in *United States* v. *Borden Company*, 308 U.S. 188 (1939), where this Court held that the express exemption from antitrust contained in the Agricultural Marketing Agreement Act of 1937 for marketing agreements approved by the Secretary of Agriculture did not apply to agreements which were not so approved. In that case, the application of antitrust could not possibly interfere with the Secretary of Agriculture's regulatory functions since in all cases where he acted to approve an agreement, the exemption would automatically take effect. There was thus no disruption of the regulatory scheme and no repugnancy between the Sherman Law and the Agricultural Marketing Agreement Act.

In the instant case, on the other hand, the subject matter involved—involuntary wholesale sales of electricity—is specifically regulated by the FPC under § 202(b). In contrast to *Borden*, and to this Court's similar decision in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966),[33] here the district court's Judgment operates

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[33] *Carnation* involved a treble damage claim predicated upon a rate-fixing agreement which had not been approved by the Federal Maritime Commission. The Court held that courts may:

"... subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers.... The award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission." 338 U.S. at 221-222.

so as to directly deprive the FPC prospectively of decision-making authority in essential areas of its jurisdiction. The problem is thus not one of construing an express exemption, but rather of permitting the regulatory scheme to function as Congress intended.

The mere fact that an industry is regulated does not, of course, mean that it is *per se* immune from antitrust. The question in each case is whether Congress intended the regulatory scheme applicable to a particular *subject matter* to be controlling. Congress' intent may thus be construed differently with respect to various subjects in the context of a single industry. *Compare, e.g.*, as to bank regulatory agencies: *United States* v. *Philadelphia National Bank, supra* (bank mergers), *with Whitney National Bank* v. *Bank of New Orleans, supra* (establishment of bank holding company subsidiary); as to the ICC: *Georgia* v. *Pennsylvania R. R.*, 324 U.S. 439 (1945) (attack on unregulated conspiracy) *with Keogh* v. *Chicago & Northwestern Ry., supra* (direct attack on regulated rates); as to the FPC: *California* v. *Federal Power Commission*, 369 U.S. 482 (1962) (merger of natural gas companies) *with Federal Power Commission* v. *Louisiana Power & Light Co.*, 32 L. Ed. 2d 369, 40 U.S.L.W. 4636 (U.S. June 7, 1972) (interstate "transportation" of natural gas); as to the FCC: *United States* v. *RCA*, 358 U.S. 334 (1959) (exchange of television stations) *with Federal Communications Commission* v. *RCA Communications, supra* (licensing of radio telegraph circuits). The only issue in the instant case is thus whether Congress intended antitrust to control the specific subject matter provided for in § 202(b).

Congress' intent may be derived from the language and legislative history of a particular enactment. For example, in *United States* v. *RCA*, 358 U.S. 334 (1959), the Court found that the legislative history of the Federal Communications Act compelled the conclusion that the antitrust laws were intended to apply and to be enforced by the courts with respect to the exchange of television

stations. In contrast, the statute and legislative history in the instant case compel precisely the opposite conclusion. The statute here specifically provides that wholesale sales are to be ordered on the basis of the criteria expressly set forth, including the FPC's judgment as to the "public interest," rather than any antitrust considerations. The legislative history likewise shows that the regulatory scheme was intended as a substitute, rather than a predicate, for competition. *See* page 40, *supra;* Add. 17-20.

In *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), this Court held that the Bank Merger Act does not preclude the application of the Clayton Act to bank mergers. The Court reached this conclusion on the basis of the pertinent legislative history and the absence in the banking field of comprehensive "public utility regulation." *Id.* at 352. It was pointed out, for example, that "[r]ate regulation in the banking industry is limited and largely indirect," that "banks are under no duty not to discriminate in their services" and that "banks may do business . . . where they please." *Id.* In contrast, "public utility regulation" is precisely what Part II of the Federal Power Act does provide. Section 201(a) declares that federal regulation of "transmission of electric energy in interstate commerce and the sale of such energy at wholesale" is necessary in the public interest. As this Court has repeatedly held, Congress specifically intended to fill the "gap" in state regulation created by the decision in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), so that state and federal regulation together would cover all aspects of the field. *See, e.g., Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972). *Cf. Federal Power Commission* v. *Louisiana Power & Light Co., supra.* Section 202 thus provides for both voluntary and compulsory interconnections, sales and exchanges. Section 203 allows the FPC to control dispositions of property, consolidations and purchases of securities by regulated

utilities. Section 204 regulates the issuance of securities and assumption of liabilities by such companies and imposes certain reporting requirements. Section 205 prohibits discrimination and affords the FPC comprehensive powers to regulate rates. Section 206 provides the FPC with power to order the furnishing of adequate service. Plainly, the Federal Power Act provides a pervasive scheme of regulation which Congress intended to be enforced by a single, expert agency.

Unlike *Georgia* v. *Pennsylvania R.R., supra,* this is not a case where there is a contract, combination or conspiracy which can be condemned under the antitrust laws separate and apart from the resulting, regulated conduct. Thus, as in *Penn Water,* this Court need not decide "what, if any, power the [FPC] has to rely on or to compel parties to carry out private contracts which would otherwise be illegal. . . ." 343 U.S. at 421. Here, the allegation of illegality is predicated upon Section 2 of the Sherman Act and consists precisely of the conduct which the FPC has been mandated to regulate. *See Pan American World Airways, Inc.* v. *United States, supra; United States Nav. Co.* v. *Cunard Steamship Co., Ltd., supra; cf. Central Transfer Co.* v. *Terminal Railroad Ass'n,* 288 U.S. 469, 476 (1933).

In sum, there is a direct repugnance between the decision and Judgment below and Part II of the Federal Power Act. The antitrust laws should thus not be applied so as to nullify § 202(b) for the determinative reason that any such construction would be obviously contrary to Congress' intent.

POINT II

The Decision And Judgment Below Are Contrary To Congress' Specific Determination That A Duty To Wheel Not Be Imposed On Electric Utilities.

The lower court held that the Sherman Act requires an electric utility to use its own transmission system to transmit (or "wheel") subsidized government power for municipalities seeking to take over its retail business. As demonstrated below, Congress specifically determined in 1935 that private utilities should *not* be required to wheel involuntarily; and it has since repeatedly reaffirmed its determination by rejecting proposed legislation that would impose this duty. The decision below directly contravenes this manifest congressional policy, and is therefore clearly erroneous.

A. In Enacting The Public Utility Act of 1935 Congress Determined That Private Utilities Should Not be Required to Wheel Government Power.

The proposed Public Utility Act of 1935, which ultimately became Part II of the Federal Power Act,[33] was principally drafted by FPC Commissioner Seavey and Commission Solicitor DeVane, later a United States District Judge, both of whom were key witnesses at the congressional hearings on the bill. *Hearings on H. R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. (1935) (hereinafter, "House Hearings") at 400, 552; *Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. (1935) (hereinafter, "Senate Hearings")

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[33] Part I of the Federal Power Act had been enacted by Congress in 1920. That statute created the Federal Power Commission and gave it certain licensing powers with respect to hydroelectric projects.

at 223. (Add. 11-12).[34] As originally drafted, this bill contained a section (202(a)) which would have made it "... the duty of every public utility to ... transmit energy for any person upon reasonable request ..." (Add. 1). In addition to this so-called "common carrier" provision, Section 203(b) of the bill would have empowered the FPC to order wheeling, upon due notice and an opportunity for hearing, if it found such action to be "necessary or desirable in the public interest." (Add. 1).

The proposed wheeling sections were vigorously opposed at the House and Senate Committee Hearings. (Add. 2-10, 25-27). It was particularly feared that if private utilities could be forced to transmit subsidized governmental power over their own lines, the result "... would be [the] complete domination of the power supply field by the Government with private operators no longer able to maintain any position in their field." (Add. 7). As one company pointed out:

> "[Private utilities] will be heavily taxed and compelled to maintain fixed schedules of rates and forbidden to discriminate, while the [governmental producer] is tax free and may charge whatever rates it pleases at any moment, and discriminates at will." (Add. 2).

Other witnesses testified that the consequent erosion of investor-owned electric systems "may impair the integrity of [the utilities] underlying obligations" (Add. 10) and would increase costs for those consumers who remained. (Add. 25).

Significantly, neither Judge DeVane nor Commissioner Seavey disputed the fact that great harm would result if private utilities were required to wheel government power.

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[34] As indicated below in the text, the pertinent sections of the proposed bill and relevant portions of the House and Senate Hearings are set forth in the Addendum.

On the contrary, both draftsmen took the position that the proposed bill would not impose any such duty;[35] but both agreed that the bill should be amended if there were deemed to be any ambiguity on this point. For example, Judge DeVane and Congressman Wolverton engaged in the following colloquy:

> "MR. WOLVERTON. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?
>
> MR. DEVANE. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such admendment might be made as to make it clear." (Add. 12).

Congressman Wolverton then posed a hypothetical question which tracks the precise facts involved in the case at bar:

> "MR. WOLVERTON. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance. Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?
>
> MR. DEVANE. No, sir.
>
> MR. WOLVERTON. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

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[35] The draftsmen believed that any such interpretation of the bill would be precluded by the exclusion of municipalities from the definition of "persons" who might require wheeling services. (*See* Add. 12, 24).

MR. DEVANE. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in." (Add. 13).

In answer to another, similar hypothetical, Judge DeVane made it clear that the "common carrier" provisions were not intended, under any circumstances, to aid competitors in ousting a utility from its retail market:

"MR. PETTENGILL. . . . I would like to ask you this question: Here is a market, let us say (indicating) in my home city; here is a generating plant, and we will say that that entire market is being supplied by this generating plant, and it is capable of furnishing sufficient power.

Here is another generating plant owned by a competitor of this one (indicating and illustrating), and does not have access to this market. It has no transmission lines. Now, do you agree that by order of your Commission you may require this company (indicating) to carry that generating plant's (indicating) energy to that market in competition with the original company?

MR. DEVANE. No, sir; if I understand your question, the answer to that is 'no.'

* * *

MR. PETTENGILL. Well, what sort of situation would the language of 202(a) apply? [sic]

* * *

MR. DEVANE. We will take a company that lies between one producing energy and another needing energy, and we will assume that the middle company cannot furnish the needed energy to its neighbor but has facilities that are available for transmitting the energy from the producing company to the one in need. The Commission could require the use of those facilities in order to meet that situation.

MR. PETTENGILL. But not to take the company that owns the line; not to take its market aware [sic] from it?

MR. DEVANE. No, not to take the market away from it; no, sir." (Add. 16-18; *see also* Add. 13-16, 21-24).

In order to clarify the intent of the draftsmen, Judge DeVane proposed an amendment which would have stated explicitly that the FPC had no power to compel the transmission of electricity produced by municipal, state or federally-owned plants. (Add. 25). This proposed amendment, however, failed to satisfy opponents of the bill who feared that a utility might still be compelled to wheel competing power *by a court* in an action (such as the one at bar) brought by someone other than the FPC. As one witness testified:

> "[The proposed amendment] does not cover it at all. It merely provides that the Federal Power Commission could not compel any company to transmit such energy. All this does is to say that the power commission's powers shall not be invoked to compel it. But the power of the Interstate Commerce Commission, for instance, is not invoked to compel a railroad to accept a shipment of goods. Any Federal court can do that because that is the law. And this is the law under section 202(a)." (Add. 27).

Consequently, in order to ensure that no utility could possibly be placed in the position in which Otter Tail now finds itself, Congress eliminated from Part II of the Federal Power Act any provision which, in Congress' view, might have allowed the FPC or a court to impose a duty to wheel on a private power company. There can be no question as to Congress' intent in excising these sections. During the floor debate Senator Wheeler, sponsor and manager of the legislation in the Senate, plainly stated:

> "Likewise there was a provision in the bill making transmission lines common carriers. That was stricken out, I may say, at my suggestion, because I did not think that at present transmission lines should be held to be common carriers." (Add. 28).

Similarly, the Senate Report accompanying the Public Utility Act of 1935 explicitly stated that, in eliminating

Sections 202(a) and 203(b) of the original bill, the legislators intended to rely solely upon *"voluntary coordination"* and to relegate wheeling to the realm of *"voluntary action."* (Add. 27-28).

The foregoing legislative history—and the policy against forced wheeling that it embodies—have been recognized by this Court, *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 313 n. 23 (1953),[36] by the Federal Power Commission itself, *City of Paris, Kentucky* v. *Kentucky Utilities Co.*, 41 FPC 45 (1969); *Village of Elbow Lake* v. *Otter Tail Power Co.* (A. 187-203), and by several circuit courts of appeal, *Florida Power Corp.* v. *FPC*, 425 F.2d 1196 (5th Cir. 1970), *rev'd in part on other grounds sub nom. Gainesville Utilities Department* v. *Florida Power Corp., supra*; *Otter Tail Power Co.* v. *FPC*, 429 F.2d 232, 235 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). *See also City of Paris, Kentucky* v. *FPC*, 399 F.2d 983 (D.C. Cir. 1968). That legislative history conclusively demonstrates Congress' specific intent that a utility (such as Otter Tail) not be legally required to wheel the power of a government agency (such as the Bureau of Reclamation) to a municipality (such as Elbow Lake or Hankinson).

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[36] *See also* Federal Power Commission v. Idaho Power Co., 344 U.S. 17 (1952), where the FPC sought to condition the issuance of a license for a hydroelectric project under Part I of the Federal Power Act upon the utility's agreement to wheel in certain circumstances. The D. C. Circuit had stricken the condition, basing its decision largely upon the legislative history of Part II of the Federal Power Act. 189 F.2d 665 (1951). This Court reversed, not because it disagreed with the D. C. Circuit's reading of Congress' intent, but because it found that the intended restrictions had no application to the conditioning of a license under Part I of the Act. This Court's decision in *Idaho Power* has thus been construed by the Federal Power Commission as an affirmance of Congress' intent not to require forced wheeling—as distinguished from Congress' acceptance of voluntary wheeling undertaken by agreement. City of Paris, Kentucky v. Kentucky Utilities Co., *infra*.

It was plainly *not* Congress' intent to withhold the power to compel wheeling from the FPC while allowing the very same obligation to be imposed by the courts in enforcing antitrust or other laws. Indeed, it was precisely in order to preclude the possibility of any such judicial action that the proposed amendment to limit the FPC's powers was rejected as inadequate; and Congress instead eliminated all provisions which might allow the use of transmission facilities to be compelled, either by the Commission, or by the courts.

In taking such action, Congress proceeded upon the understanding that no existing law, such as the Sherman Act, required utilities to wheel in any event, regardless of how the Federal Power Act might be amended. Certainly no witness at the House or Senate Hearings suggested this possibility. On the contrary, Judge DeVane specifically testified that no legal obligation to wheel then existed and that the industry practice in the field was based on voluntary agreement. (Add. 21). Commissioner Seavey similarly testified that private power companies could be required to transmit government power only if Congress enacted an additional, particular provision to that effect. (Add 23-24).

If the district court's holding on the wheeling issue is correct, the proceedings in the 74th Congress were nothing more than an exercise in futility. Under the court's view, the provisions as to compulsory wheeling in the original draft of Part II of the Federal Power Act were unnecessary—an absolute duty to wheel having existed since the enactment of the Sherman Law in 1890—and the elimination of those provisions was thus totally without effect. In other words, the thousands of pages of House and Senate Hearings at which scores of witnesses testified and legislators carefully deliberated on the merits of the proposed bill would amount to nothing more than a great deal of sound and fury, signifying nothing beyond a mammoth waste of time and effort. Surely, any such interpretation of the Sherman Act, which would make a mockery of the legislative process, must be rejected.

The plain fact is that Congress refused to enact compulsory wheeling in 1935 because it determined that the imposition of such a duty would be inimical to the national welfare. As demonstrated above, it was the consensus at the House and Senate Hearings that involuntary wheeling would adversely affect the utility industry and the public generally, the harmful consequences in question being the same regardless of whether the obligation to wheel emanates from the FPC enforcing the Federal Power Act or (as here) from a court applying the antitrust laws. Consequently, as the Senate Report plainly states, Congress determined that wheeling should be a matter of *voluntary* action on the part of the utilities rather than something which could be compelled by the operation of any law. The decision below is directly contrary to this congressional determination and therefore clearly erroneous.

B. Since 1935 Congress Has Repeatedly Reaffirmed Its Intent That Forced Wheeling Should Not Be Imposed On Private Utilities.

Numerous bills were introduced in the 88th through 92nd Congresses which, in one form or another, would have imposed a duty to wheel on private utilities. Thus far, Congress has declined to enact any of this proposed legislation into law.

In 1963, two identical bills were introduced in the 88th Congress (S. 350 and H. R. 2101)[37] which would have conditioned the issuance of certificates of convenience and necessity for extra-high-voltage interstate transmission lines upon an applicant's willingness to make its excess capacity "available on a common carrier basis for the transmission of other electric energy." (Add. 28-29). Though both bills died in committee, they were reintroduced in

[37] The relevant sections of the wheeling bills introduced in the 88th through 92nd Congresses, as well as pertinent excerpts from the hearings with respect thereto, are set forth at Add. 28-51.

the 89th Congress as S. 1472 and H. R. 2072. At this same session, two alternative bills were also introduced (S. 2140 and H. R. 7791) which likewise would have conditioned the issuance of certificates for extra-high-voltage transmission, but which did not provide expressly for wheeling. (Add. 29-30).

Many municipal power advocates testified at the hearings on the Senate bills. *See Hearings on S. 1472, S. 2139 and S. 2140 Before the Senate Comm. on Interstate Commerce,* 89th Cong., 2d Sess. (1966). (Add. 30-40). Among others, the Legislative Director of the American Public Power Association criticized S. 2140 for its failure to impose a specific duty to wheel. (Add. 38-39). To support his argument, this witness described the same events involving the Town of Hankinson which the district court relied upon in arriving at its decision in the case at bar. (Add. 39). Presented with these facts, Congress declined to enact the bill which the public power proponents advocated (S. 1472).

On the other side, those opposed to wheeling presented many of the arguments which had been successfully urged before Congress in 1935,[38] as well as pointing out the planning problems and reduced reliability which would result if the component parts of an integrated system could be used by third parties. (Add. 30-33).[39] In addition, FPC Chairman White testified *against* an invariable duty to wheel, stating:

> ". . . this type of condition is not appropriate in every case. There is no doubt in my mind that the

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[38] *E.g.*, that wheeling would put private industry at a competitive disadvantage and lead to the erosion of its retail market. (Add. 33-35).

[39] Significantly, Senator Metcalf, sponsor of S. 1472, defended his bill in this regard by pointing out that (unlike the Judgment in the instant case) the proposed legislation would only apply to *"excess"* transmission capacity. (Add. 36).

> Commission could act more efficiently to protect the public interest if it were free to choose among methods of guaranteeing participation in the projects it would certificate to all whose participation would be in the public interest. In some cases, for example, joint construction and ownership of a line might be a better solution than 'common carrier' status imposed by statute." (Add. 35).

The Justice Department responded to the FPC in the form of a letter from then Deputy Attorney General Ramsey Clark to Senator Magnuson, Chairman of the Senate Commerce Committee. Mr. Clark wrote:

> ". . . we favor an amendment to the bill to require a certificate holder to transmit power to anyone who requests it and wheel power for anyone who tenders it. However, the Federal Power Commission . . . has indicated that this type of condition is not appropriate in every case. * * * As an alternative we would, therefore, recommend that the bill be amended to provide that if any certificate holder refuses to transmit or wheel power the Commission shall hold hearings to determine if such refusal was justified—taking into consideration the burden upon the certificate holder to transmit the power and his duty to act in the public interest. Also, the Commission should be given the power to require the wheeling or transmission of power, prorated if necessary, where the refusal is found to be unjustified." (Add. 40).

In other words, the Justice Department took a far more moderate position before Congress than it has taken in the case at bar, advocating at that time only a conditional duty to wheel subject to FPC discretion. Nevertheless, the Department failed to convince Congress to enact the legislation which it proposed.

In 1967, S. 1472 and H. R. 2072 (providing for an express wheeling condition) were reintroduced in the 90th Congress as S. 1834 and H. R. 2311; and S. 2140 (providing for a general FPC power to condition certificates) was

reintroduced as S. 1835. In addition, Congressman Moss, among others, introduced the Electric Power Reliability Act of 1967 (H. R. 12322), which would have empowered the FPC to order wheeling, after notice and hearing, if it found that such action was necessary or appropriate to carry out the objectives of the Act, and that no undue burden would be placed on the utility as a result. (Add. 40-41).[40] At the hearings on these various bills, public power advocates again testified in favor of wheeling; and industry representatives and others (including state regulatory officials) testified—successfully—on the other side. *See Hearings on S. 1934 and Related Bills Before the Senate Comm. On Interstate Commerce*, 90th Cong., 1st Sess. 16, 26 (1967) (Add. 41-43). *See also* 113 CONG. REC. 22513-22519 (1967) (remarks of Congressman Moss).

In 1969, the substance of the "Electric Power Reliability Act" was reintroduced in a number of bills in the 91st Congress (S. 1071, H. R. 7016, H. R. 7052, H. R. 7186 and H. R. 9557). In addition, the Electric Power Coordination Act was introduced as H. R. 12585, proposing an express congressional policy in favor of wheeling and the imposition of common carrier status on transmission lines. (Add. 44-45). Again, hearings were held, *see Hearings on H. R. 7186 and Related Bills Before the Communications and Power Subcomm. of the House Interstate and Foreign Commerce Comm.*, 91st Cong., 1st & 2d Sess. (1971) (Add. 45-49); and again all of the proposed bills died in committee.

At least seven proposed wheeling bills are now pending before the 92nd Congress: four (S. 294, H. R. 605, H. R. 3838 and H. R. 5941) to enact the Electric Power Realiability Act giving the FPC power to order wheeling; one (H. R. 6972) to enact the Electric Power Coordination Act imposing common carrier status on transmission lines

[40] Another version of the Electric Power Reliability Act which did not provide for wheeling was introduced in the Senate as S. 1934.

and two (S. 2324 and H. R. 9970) to enact the National Power Grid Act, which, *inter alia,* would create regional bulk power supply corporations and require those entities to insert wheeling conditions in their contracts with private utilities. (Add. 49-50). Hearings have already been held, *see Hearings on H. R. 5277 and Other Bills Before the Communications and Power Subcomm. of the House Interstate and Foreign Commerce Comm.*, 92nd Cong., 1st Sess. (1971), with the advocates for and against forced wheeling once again laying their arguments and evidence before Congress. (Add. 50-51). Since the 92nd Congress is still in session, the fate of the various wheeling proposals (all still in committee) remains uncertain.

In sum, Congress has repeatedly reaffirmed its determination that forced wheeling should not be imposed. Surely, that decision—and the democratic processes by which it was arrived at—may not be circumvented by a district court in the context of an antitrust suit.

C. The Decision And Judgment Below Are Contrary To The Manifest Intent Of Congress.

1. The district court's Judgment requires Otter Tail to wheel electricity for any municipality which makes a demand. (A. 132). This Judgment is predicated upon the court's holding that Otter Tail violated Section 2 of the Sherman Act by refusing to transmit Bureau of Reclamation power to the towns of Elbow Lake and Hankinson. (A. 36-38). Otter Tail was found to have had "dominance" over transmission with respect to these municipalities on the basis of evidence showing that the use of Otter Tail's lines provided the cheapest of the several feasible alternatives by which the towns could have secured a supply of wholesale power. *See* pages 11, 12, *supra.* On this basis, a private utility would have to wheel governmentally produced power in virtually any case where there would be an incentive for a municipality to request such service. In short, the lower court has imposed common carrier status

by judicial fiat on the transmission lines of Otter Tail in particular, and on those of electric utilities in general.

As noted above, the 74th Congress deliberately rejected the imposition of just such a common carrier obligation. Even standing alone, Congress' refusal to enact a statutory wheeling requirement would constitute decisive evidence of its intent. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713, 721 (1971) (Douglas, J.); *id.* at 733-734 (White, J.); *id.* at 745-747 (Marshall, J). As Justice Marshall stated, "[w]hen Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress." *Id.* at 745-746. Here, Congress' intent in rejecting the wheeling sections of the 1935 bill need not be inferred; it is explicitly spelled out in a wealth of legislative history demonstrating Congress' considered judgment that under no circumstances should electric utilities be required to wheel involuntarily.

2. As in *Flood* v. *Kuhn*, 32 L. Ed. 2d 738, 744, 40 U.S.L.W. 4747, 4754 (U.S. June 19, 1972), here "remedial legislation"—to impose wheeling—"has been introduced repeatedly in Congress but none has ever been enacted." In the circumstances at bar, this plainly constitutes "something other than mere congressional silence and passivity." *Id.* The fact of the matter is that this case has been tried time and again—and indeed is still being tried—in Congress. All of the policy arguments with respect to wheeling, and even the facts at bar (*see* pages 48-49, 54, *supra*), have been presented to that body. While the district court rejected evidence that forced wheeling would result in the erosion of Otter Tail's system,[41] impair its credit and harm

[41] Although apparently accepting Congress' assessment that forced wheeling would afford governmental producers an insuperable advantage, the district court found that Otter Tail's fears of erosion were unjustified in view of the limited availability of Bureau of Reclamation power. (A. 46). The evidence at trial, however, showed that, as a matter of history, the Bureau has repeatedly

consumers (A. 666, 667, 695-722, 737-749, 935-964; DX-41, A. 1194, 1195, 738, 739, DX-96, A. 952; Dep. Ex. 287, pp. 285-287, A. 280-286), testimony to precisely the same effect (Add. 2-10, 33-35, 42-43) has thus far persuaded Congress that wheeling should be left in the realm of voluntary action. Plainly, if the law is to be changed and forced wheeling is to be imposed, Congress should be the one to make the decision.

3. Even proponents of forced wheeling have generally favored the scalpel of regulatory discretion rather than the bludgeon of an absolute duty. (Add. 35-37, 40, 50-51). In this connection, the inappropriateness of judicial law-making here is highlighted by the district court's total disregard of the practical consequences of its Judgment in terms of the continued operation of the nation's electric systems.

Numerous witnesses at the 1935 and subsequent hearings testified that forced wheeling is technologically impractical. (Add. 4, 10). A utility's transmission lines constitute a component part of its integrated system, the physical nature of electricity being such that generation, transmission and use all occur simultaneously. (Add. 2-4). Planning in terms of both operation and future investment must thus be done on a system-wide basis. (Add. 31-33, 42).

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asserted its lack of capacity, but has nevertheless always increased its generating output to meet demand. (A. 440-442, 617, 618, 794, 795; Dep. GX-204A, p. 31, and Dep. GX-204C, pp. 58, 59, A. 285-286, 275, 276). Furthermore, a number of projects are presently in the planning stage which would vastly increase the supply of government power. (DX-23, A. 1184-1193, 460; Otter Tail Muller Dep. Ex. A, A. 1214-1218, 315; DX-24, A. 460; A. 437, 438, 449-460, 579-581, 617-624, 798-802, 832, 833; Dep. GX-204, pp. 50-65; Dep. GX-204D, pp. 14, 15; Dep. GX-204E, pp. 33-36, 63-68, 285-286; Dep. GX-287, pp. 266-268; A. 285-286). Whatever the future developments may be, however, nothing in the court's holding or its Judgment limits the requirement of forced wheeling to cases where it would be meaningless, *i.e.*, where there is no government power to be wheeled in any event.

If the capacity of a single transmission line is exceeded, the system as a whole—and perhaps interconnected systems as well—may shut down. (Add. 30-31).

Industry spokesmen have repeatedly testified that the necessary system planning cannot be effectuated if some component parts—*i.e.*, transmission lines—are available for use by others. (Add. 31-33). In rebuttal, the proponents of wheeling bills have pointed out that only excess transmission capacity would be affected. (Add. 36). *Compare Federal Power Commission* v. *Idaho Power Co., supra.* Opponents have replied that reliability requires reserve transmission capacity and that, for this reason among others, the term "excess" is intrinsically unrealistic. (Add. 30, 32-33).

In the case at bar, the district court's Judgment requires Otter Tail to wheel for any municipality which makes a demand, regardless of whether Otter Tail has excess capacity or not. (A. 208). The court avoids the problem which troubled Congress by simplistically stating that Otter Tail must have sufficient capacity since it served the municipalities in question at retail. (A. 107, 126). But, as the government witness on this point conceded, capacity which is presently sufficient may become inadequate in one, two or three years time. (A. 640, 641). Since the lines serving Otter Tail's former municipal customers are integral parts of a single transmission system, the adequacy of Otter Tail's transmission capacity must be gauged in terms of the increasing needs of all its customers, not merely the consumers residing in a particular municipality. The lower court's assertion of a dogmatic, antitrust duty to wheel on demand for all existing and proposed municipal systems thus provides no safeguard to ensure the adequate functioning of Otter Tail's system. If upheld as a rule of law, it would make it virtually impossible for private utilities to assure the continuance of reliable service, particularly in view of the problems which the industry already faces in terms of meeting the predictable and vastly ex-

panded power needs of the nation during the remainder of this century. *See, e.g.*, FPC, 1970 NATIONAL POWER SURVEY at I-3-4 (1972).

4. Nothing would be more contrary to Congress' intent than to construe the deletion of the wheeling provisions from Part II of the Federal Power Act as creating a regulatory "gap" to be filled by the simplistic application of antitrust. Any such interpretation would imply the existence of antitrust-derived obligations to cover precisely those areas in which Congress expressly determined that no duty should be imposed at all. By a parity of reasoning, if congressional limitation of the FPC's powers so as to preclude forced wheeling is deemed to create a "gap," then the provisos of Section 202(b), which similarly limit the FPC's discretion so as to preclude certain compulsory interconnections—*i.e.*, those which would impose an undue burden, require increased generating facilities, impair service, or otherwise not be in the public interest—must also be viewed as creating "gaps" in the regulatory scheme, and therefore defining the proper scope of antitrust. In other words, if compelling a particular wholesale sale would not require a utility to build new generating facilities, it may be ordered by the FPC in a Section 202(b) proceeding; but if increased generating capacity would be required, the very fact that the FPC "has no authority" to order the sale, *Gainesville Utilities Department* v. *FPC*, 402 U.S. 515, 521 (1971), would empower a court to do so. Under this view, an antitrust plaintiff might be able to obtain a court order requiring a utility to sell at wholesale, if—but only if—the plaintiff could prove, as an essential element of its case, that the relief being requested would impose an undue burden on the defendant, harm other consumers or otherwise be contrary to the public interest. Obviously, any such bizarre reading of the law would completely destroy the regulatory scheme which Congress sought to create.

The fact is that Congress enacted Part II of the Federal Power Act with the specific intention of occupying the entire field of interstate transmission and wholesale sale of electric power and thereby filling the "gap" in state regulation created by the decision in *Attleboro*. *See, e.g., FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 458 (1972). In placing certain limitations on the FPC's discretion, Congress certainly did not intend to create new "gaps." Rather, these limitations represent a congressional effort to predetermine certain issues which would otherwise have been left open for the FPC to decide by applying the "public interest" standard. Such determinations are plainly no less a part of the regulatory scheme because they were made by Congress in 1935 rather than by the Commission acting today. Nor do they fail to constitute regulation because they are negative rather than positive in effect; a determination not to order an interconnection in certain defined circumstances is as much a part of the regulatory function as a determination that such action may be compelled in other situations. By the same token, Congress' determination that forced wheeling would not be in the public interest constitutes "regulation" to precisely the same extent as its contrary determination that, in certain circumstances, compulsory interconnection would be desirable.[42]

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[42] Limitations with respect to the FPC's discretion and remedial powers thus in no way confine the scope of its jurisdiction. Where an applicant requests an interconnection that would be unduly burdensome, the FPC's lack of authority to grant such relief does not leave the applicant free to seek the same order from a district court; rather, the FPC retains jurisdiction to implement an arrangement which would be in the public interest. Similarly, in City of Paris, Kentucky v. Kentucky Utilities Co., 41 FPC 45 (1969), after the FPC determined that it had no power to compel wheeling, the Commission added that it nevertheless did have jurisdiction to provide proper relief in the premises, and it proceeded to order a mandatory interconnection under § 202(b). *See also* Village of Elbow Lake v. Otter Tail Power Co. (A. 187-203).

In sum, the FPC's inability to order wheeling does not constitute a regulatory "gap," and to misconstrue it as such would frustrate congressional objectives by encouraging antitrust suits to achieve precisely the kind of compulsion as to wheeling that Congress determined would be inimical to the national welfare.

5. The provision in the Amended Judgment allowing the FPC to pass on the rates, terms and conditions for forced wheeling highlights the fundamental error in the decision below. As this Court stated in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra*:

> "The fact that the Congress withheld from the [Federal Power] Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent." 341 U.S. at 254.

By its Judgment, the district court effectively conceded its incompetence to enter a mandatory wheeling order on its own. But it cannot lawfully seek to remedy this defect by judicially granting to the FPC all or part of the very power which Congress specifically and repeatedly has chosen to withhold.

In summary, Congress determined in 1935 that electric utilities should not be compelled to wheel power involuntarily. While the issue of whether Congress should reverse that decision has been the subject of intensive legislative debate for over a decade, Congress has thus far elected to stand by its original determination. In these circumstances, the lower court's decision and Judgment represent nothing less than an attempt to reverse Congress judicially and to pre-empt its role in deciding important matters of national policy. Such a result is "utterly inconsistent with the concept of separation of powers," and

should be reversed. *New York Times Co.* v. *United States*, 403 U.S. 713, 742 (1971).

POINT III

The Decision And Judgment Below Are Directly In Conflict With The Rulings Of This Court In *Noerr* And *Pennington*.

In *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court held that the Sherman Act was intended to regulate business, not political activity. Concerted action to influence government is therefore lawful, even if the techniques used are unethical and the purpose to be achieved is clearly anti-competitive. In *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), the Court affirmed that "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

In the instant case, the determinations which Otter Tail allegedly sought to influence were all basically political in nature. In other words, the residents of each municipality decided for or against municipal power at the polls, in their capacity as electors, rather than in the marketplace, in their capacity as purchasers. The question in each instance was not which supplier would prevail in the competitive struggle, but rather whether or not local government should simply take over the retail electric business for its citizens and thereby exclude private enterprise entirely.

If this dispute had taken place at the national level, the inapplicability of antitrust would be obvious. If Congress, for example, were actively considering the outright nationalization of all electric utilities, no one would question the right of the private companies to oppose this move by political campaigns, litigation or the refusal to volunteer the use of their facilities. But the same principles

are equally controlling when a particular municipality elects to switch from private to public ownership in a given industry. Under *Noerr* and *Pennington* the Sherman Act plainly has no place in such political controversies at any level of government.

As noted above, the district court admitted in evidence, over Otter Tail's objection, a mass of political campaign material. *See* page 13, *supra*. Far from disclaiming any reliance on this evidence, the opinion below reiterates the government charge that Otter Tail monopolized by "participating in local municipal power political campaigns." (A. 31, 32). This, by itself, constitutes sufficient grounds for reversal under *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 669-670 (1965).

With respect to the lawsuits brought or supported by Otter Tail, the district court again erred by assuming—incorrectly—that the principles articulated in *Noerr* and *Pennington* apply ". . . only to efforts aimed at influencing the legislative and executive branches of the government." (A. 41). This Court recently stated precisely the opposite in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972):

> "The same philosophy [as was expressed in *Noerr*] governs the approach of citizens or groups of them to administrative agencies . . . and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition."

The circumstances at bar make the application of *Noerr* and *Pennington* especially compelling in the instant case.

1. Four of the six suits considered below involved the failure of a local government to hold an allegedly required election. Two of these were mandamus actions to compel compliance with initiative petitions. *See* pages 14-18, *supra*. Such litigations are clearly as much a part of the

political process as suits to impound contested ballots or challenges to the seating of convention delegates. *Cf.*, *O'Brien* v. *Brown*, 41 U.S.L.W. 4001 (U. S. July 7, 1972). The decision and Judgment below thus intrude upon protected political activities as well as directly depriving Otter Tail of its constitutional right to petition. This result is not only contrary to the decisions of this Court, it also has the unfortunate effect of removing a significant check which presently ensures the integrity of the democratic process.

2. There is nothing in the instant record which could possibly bring this case within the "sham" exception to *Noerr*. In contrast to *California Motor Transport*, there is no allegation here (and a fortiori no proof) that Otter Tail "sought to bar [its] competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process." 404 U.S. at 512. No lawsuit brought by Otter Tail has had that effect. On the contrary, the municipalities in question have repeatedly availed themselves of their own rights of free access to the courts and administrative agencies. *See* pages 15-17, 19, *supra*. The district court's Judgment has thus created the exact converse of the situation in *California Motor Transport*. The municipalities may freely seek administrative or judicial redress; but the courtroom door remains barred to Otter Tail. Such one-way access to the judicial system plainly violates the most basic guarantees of equal protection, as well as the constitutional right to petition all branches of government.

3. Again in contrast to *California Motor Transport*, the court below did not find—and the record does not show—any "pattern of baseless, repetitive claims." 404 U.S. at 513. Far from being "baseless," three of the six suits considered below were at least partially successful; and two of the three which Otter Tail lost were decided upon such technical grounds that clearly "the most which can be said . . . is that the questions litigated . . .

were debatable." *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 798 (2d Cir. 1924). *See* pages 14-16, 18, *supra*. While the sixth suit was unsuccessful on the merits, the town's subsequent attempt to recover damages on account of this litigation was rejected by both the trial and appellate courts. *See* pages 16-17, *supra*.

There is thus no evidence in this case which could conceivably lead to the conclusion that "judicial processes [had] been abused." 404 U.S. at 513. On the contrary, the record plainly shows that Otter Tail did not sue in every instance, that it had no general policy with respect to such litigation, and that each decision to bring suit was made at the highest levels and based upon a careful assessment of the merits of the particular case in question. *See* page 18, *supra*.[44]

[44] In light of the above facts, it is clear that the authorities relied upon by the district court totally fail to support its holding. (*See* A. 41-42). In Plastic Contact Lens Co. v. Butterfield, 366 F.2d 338 (9th Cir. 1966), *cert. denied*, 385 U.S. 1069 (1967), the court rejected the plaintiff's antitrust claim, finding "nothing in the record indicates that the claims for unpaid royalties in the suits were not made in good faith." 366 F.2d at 345. In Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965), this Court found that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present." 382 U.S. at 174. The Court added, however, that good faith, including an honest mistake, would be a "complete defense." *Id.* at 177. In Kobe v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952), in contrast to Otter Tail's carefully considered decisions to litigate, Kobe (i) brought its action without any concrete information that the Dempsey pump in fact infringed its patents, and (ii) proceeded to amend its complaint to add a totally groundless claim based on unfair competition. *Id.* at 424. In addition to being distinguishable on its facts from the instant case, *Kobe* is contrary to Virtue v. Creamery Package Manufacturing Co., 227 U.S. 8 (1913), which held that even an infringement action brought maliciously and without probable cause would not violate the Sherman Act. *See also* International Visible Systems Corp. v. Remington-Rand, Inc., 65 F. 2d 540 (6th Cir. 1933); Straus v. Victor Talking Machine Co., 297 F. 791, 797 (2d Cir. 1924).

4. No suit brought or supported by Otter Tail has had the effect of preventing the establishment of a single municipal electric system. *See* pages 7, 17, 19, *supra*. Nevertheless, under the Judgment below, Otter Tail is henceforth totally barred from seeking judicial redress to protect its business from a municipal takeover, regardless of how flagrantly unlawful a particular municipality's actions may be. (A. 208). The district court has thus absolutely enjoined the exercise of a constitutional right without even the color of a compelling need in terms of the objectives of the antitrust laws.

In summary, the district court has misapplied the antitrust laws so as to dictate the outcome of essentially political disputes and to deprive Otter Tail of its right of free access to the courts. Obviously, Otter Tail's constitutional rights are no less sacrosanct where its participation in local political campaigns and litigation efforts are aimed at preventing its own ouster from a particular municipality. As this Court stated in *Noerr*:

> "A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." 365 U.S. at 139.

Indeed, if Otter Tail is barred from going to court to contest even clearly illegal municipal action that will destroy its business, Otter Tail is also effectively being deprived of its property without due process of law and is thus being stripped of yet another constitutional guarantee. Plainly, Congress never intended the Sherman Act to supersede such basic freedoms "protected by the Bill of Rights," *id.* at 138, and the lower court's decision to the contrary is clearly erroneous.

POINT IV

The Decision Below Misconstrues The Antitrust Laws And Their Application To The Facts At Bar.

As demonstrated in the preceding pages, the district court erred in invoking antitrust so as (i) to supersede the regulatory scheme of Section 202(b), (ii) to reverse Congress' determination that involuntary wheeling will not be compelled, and (iii) to deprive Otter Tail of basic constitutional rights. In this Point we shall show that the decision below is also erroneous as a matter of antitrust law, first, because the district court misconstrued fundamental antitrust principles and, second, because it applied these mistaken concepts to an electric utility as though it were dealing with a tobacco company or shoe manufacturer, without recognizing how inapposite are traditional antitrust concepts when mechanically applied to a pervasively regulated industry.

The district court commences its antitrust analysis by quoting the definition of monopoly set out in *United States v. Grinnell Corporation*, 384 U.S. 563, 570-571 (1966), to the effect that a Section 2 offense consists of (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. (A. 32-33). The existence of monoply power, according to the Court, depends upon the ability to fix prices or exclude competition. (A. 32). Recognizing the patent absurdity of applying the Sherman Act to condemn a monopoly conferred by state or local grant, the court predicates its finding of a Section 2 violation on the willful maintenance of a lawful monopoly. (A. 31). How one lawfully possessing monopoly power can function without willfully maintaining it in the normal operations of its business, the court does not pause to explain. Rather, it finds that Otter Tail had maintained its monopoly power in three ways. First, Otter Tail's refusal to sell at wholesale and wheel is said to be unlawful under certain "refusal to deal" cases cited by the court.

Alternatively, a utility's refusal to wheel electricity is held to be unlawful under what the court called the " 'bottleneck theory' of antitrust law." (A. 39). Finally, Otter Tail is found to have "monopolized" by bringing or supporting certain law suits relating to the municipal power issue. In addition, the district court found that certain contracts which Otter Tail had entered into with the Bureau of Reclamation and with various rural electric cooperatives were illegal *per se* because they provided that one or both parties would wheel power for the other to certain municipalities but not to those which the wheeling party was then serving at retail.

As demonstrated below, this invocation of *per se* concepts is ridden with a multiplicity of errors.

1. In holding that Otter Tail has "monopoly power," the district court distorted the meaning of Section 2 by disregarding the substantive evils at which the statute is aimed. Although it correctly observed that an essential element of a monopoly condemned by the Sherman Act in the unregulated sector is the ability to fix prices or exclude competition (A. 32), the court never paused to consider whether Otter Tail—a regulated utility—actually has such power. In fact, Otter Tail does not possess the power to "fix prices." In Hankinson, Finley and Velva—the only towns considered below which Otter Tail is still serving at retail—its rates are thoroughly regulated by the North Dakota Public Service Commission.[45] In South Dakota[46] and Minnesota[47] its retail rates are regulated at the municipal level. Throughout its service area, Otter Tail may sell at wholesale only at rates and upon terms and conditions approved by the Federal Power Commission. 16 U.S.C. §§ 824, 824d-824g. It is thus a contradiction

[45] N. D. Century Code, §§ 49-02-01 to -03, -15 to -20 (1960), *as amended* (1971 Supp.).

[46] S. D. Compiled Laws § 9-35-1 (1967).

[47] Minn. Statutes §§ 300.03-04, 454.041-.043 (1967).

in terms to speak of the power to fix prices in a regulated industry context where the regulatory bodies are the ones that determine how much a company may charge. In this setting, regulation provides a surrogate control over price in lieu of the competition which antitrust is designed to foster.

Otter Tail's power to exclude competition is likewise limited as a matter of law by state and federal regulation;[48] and its impotence in this regard is demonstrated as a practical matter by the fact that every municipality considered below which voted for public power now has its own electric system. *See* pages 7, 17, 19, *supra.* In fact, the power to exclude competition in this case rests solely with the municipalities, since it is they who may terminate Otter Tail's franchises and take over its retail business if they choose to do so.

In short, the regulatory framework within which Otter Tail operates is of determinative significance. It is obviously meaningless to characterize a regulated utility as a "monopolist" without regard to the state and federal laws which deprive it of the very indicia of monopoly power that the Sherman Act proscribes.

2. The folly of a simplistic application of *Grinnell* is that it would make it an antitrust violation for a utility to take any action to preserve or expand its system to meet the needs of the public. For example, under *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 430-31 (2d Cir. 1945), the persistent and continued increase of capacity to meet expanded demand was deemed the equivalent of exclusionary maneuvers. Yet such expansion of capacity is precisely what every electrical utility in the United States is trying to accomplish today and, indeed, must accomplish if massive blackouts and brownouts are

[48] *See, e.g.,* N. D. Century Code §§ 49-02-02 thru 49-02-04, 49-02-15, 49-04-01 thru 49-04-02, 49-04-07; S. D. Compiled Laws §§ 49-41-9.1 thru 49-41-9.8 (1972 Supp.); 16 U.S.C. §§ 824d, 824e.

to be avoided. The rigid application to electric utilities of rules established in other, quite different, industrial contexts will thus inevitably serve to undermine policies of crucial importance to the national welfare.

3. The alternative market analyses which the court relied upon in lieu of a meaningful examination of Otter Tail's true economic position are both also erroneous in themselves. The court's finding that each municipality constitutes a separate "relevant market" is plainly a *reductio ad absurdum*. If Otter Tail is a monopolist as to the municipalities it still serves, then each municipal power system is likewise a monopolist in its particular town. Certainly nothing in the Sherman Act suggests a preference for unregulated,[49] public monopolies as opposed to private, regulated ones.[50] It is an unavoidable fact that the practicalities of electrical distribution generally require that a small town be served by a single system. But to regard this circumstance as a sufficient predicate for invoking Section 2 of the Sherman Act would make it equally unlawful both for a municipality to seek to replace Otter Tail and for Otter Tail to defend itself against such a total ouster. Under the district court's analysis, any such effort by either side would have to be condemned as a willful attempt to acquire or maintain monopoly power. (A. 32-33).

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[49] Municipalities are generally exempt from state and federal regulation. *See, e.g.*, N. D. Century Code, § 49-02-01.1; 16 U.S.C. § 824(f). Municipal regulation obviously has no application where the municipality itself takes over the business of furnishing electricity at retail.

[50] In this connection, it is incongrous that the district court's Judgment would enjoin Otter Tail from litigating with, or refusing to sell at wholesale or wheel to, established municipal electric systems—such as Elbow Lake's—which have already assumed a "monopolistic" position. (*See* A. 130). It is surely a strange antitrust decree which serves to support entrenched "monopolists" in this manner.

Furthermore, to the extent that public versus private power disputes may be regarded as "competition",[51] the entity whose custom is being competed for is the town as a whole, rather than each resident acting individually. In other words, the citizens of a particular municipality must make a collective decision as to whether their town will be served by Otter Tail, or will establish its own electric system. The municipality's business can only be won or lost as an indivisible unit, on an all or nothing basis. In this context, the lower court's construction of the Sherman Act—which would prohibit any attempt to gain or preserve the patronage of a particular municipality—in effect makes competition a *per se* offense. Surely, Congress never intended that the antitrust laws be given such a bizarre reading.

The error of the district court's holding that Otter Tail may not defend its business in particular municipalities is further demonstrated by the decision of the First Circuit in *Union Leader Corporation* v. *Newspapers of New England, Inc.*, 284 F. 2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). Dealing with the activities of competing newspapers in a small town which could support only one paper, the court held:

> "We do not think the fact that competition is in a natural monopoly climate can limit a defendant's right to defend itself. We have already pointed out that Union Leader was not restricted by this circumstance. What is sauce for the goose is sauce for the gander, and, while there may be two different flavors, the stock is the same. In the one situation we have recognized that entry into a monopoly market without more does not taint otherwise legal conduct; now we are saying that the existence of such a market cannot circumscribe conduct which might otherwise be justified as defensive. Essentially, we refuse to permit the inevitable

[51] As shown in Point III, *supra*, the outcome of such controversies are determined by the citizens of the town acting as electors in the political process rather than as purchasers in the market milieu to which the word "competition" normally applies in antitrust.

monopoly to give either competitor a fortuitous advantage." 284 F. 2d at 587.

The First Circuit's reasoning is a fortiori applicable to the instant case where each municipality is not only a natural monopoly but also the very unit whose collective "purchasing decision" competitors may seek to influence.

4. Apparently recognizing the conceptual difficulties of regarding each municipality as a separate market, the district court held in the alternative that the relevant geographical market consists of all towns in Otter Tail's service area. (A. 33, 34; Findings 187, 188, A. 87, 88). Here, however, it was able to attribute monopoly power to Otter Tail only by the patently illogical device of counting all towns as equal units regardless of their size. *See* page 6, *supra*. Applied to other industries, this analysis would condemn as a "monopolist" a vendor of machinery which sells twenty units to twenty small companies while its competitor sells two hundred units to the three or four largest firms. Based upon the more rational standard of the kilowatt hour volume of its total retail sales, Otter Tail commanded only 28.9% of the market in question (DX-94, A. 1201-1210, A. 873)—hardly a monopolist's share.[52]

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[52] Although the alternative relevant market urged by the government was said to be "the towns in the Otter Tail service area" (A. 33), the district court's computation is not in fact based upon all such towns, but rather upon a highly limited selection. The court thus eliminated all municipalities served by other investor-owned systems on the ground that these utilities do not compete for the business of municipalities served by Otter Tail. (A. 90; *but see* A. 897, 898, 912, 913). The court further suggested that the 105 towns served by rural electric cooperatives likewise not be counted since REA's purportedly also do not compete as to Otter Tail's municipalities. (A. 34). By a parity of reasoning, towns having their own municipal systems should likewise be omitted since they do not typically seek to expand service to other political subdivisions. Thus, as with its finding that each municipality constitutes a separate market, the court's analysis resolves itself to the absurdity that every electrical supplier is a monopolist as to its own customers.

5. The court further erred in its holdings as to the particular means by which Otter Tail purportedly "monopolized". As shown in Point II, *supra*, the court's imposition of a duty to wheel directly contravenes Congress' clear policy determination on the very same subject. The court's holding as to wheeling is also erroneous, however, as a matter of antitrust law. Here, the court relied upon the so-called "bottleneck theory" devised by a British civil servant, A.D. Neale (*see* Neale, THE ANTITRUST LAWS OF THE U.S.A. 131-137 (1960)) (A. 39). In fact, no such theory has ever been recognized by the courts, and none of the cases cited by either Mr. Neale or the district court support the conclusion that antitrust requires a company to make its individually-owned capital facilities available to competitors. To the extent they involve the use of capital facilities at all,[53] the illegality found in these decisions is invariably predicated upon an unlawful combination or group boycott.

In *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912),[54] for example, a group of railroads joined

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[53] The refusal to deal cases cited by Mr. Neale and the court all involve a refusal to buy or sell products or services—not a refusal to allow competitors the use of the defendant's own capital assets. *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945); Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3rd Cir. 1958); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966). Thus, while the court held in *Lorain Journal* that a newspaper may not seek to maintain its monopoly position by refusing to sell advertising to customers who also advertise with a competing radio station, the case nowhere suggests that Lorain Journal had a duty to affirmatively help its competitor take away particular accounts by (for example) furnishing it with confidential customer lists.

[54] *See* A. 39; Neale, *supra* at 131-132.

together in the defendant association to acquire for their own exclusive use all of the bridges whereby competitors might gain access to the City of St. Louis. The Court found that such *concerted* activity conducted for a plainly anticompetitive purpose "resulted in a *combination* which is in restraint of trade within the meaning and purpose of the Anti-Trust Act." *See* 224 U.S. at 394 (emphasis added).

Similarly, in *Associated Press* v. *United States*, 326 U.S. 1 (1945),[55] the government attacked as a contract in restraint of trade that portion of AP's by-laws which made it virtually impossible for a newspaper to join the association if a competing newspaper in the same community was already a member. Under the by-laws, this meant that the excluded newspaper was not only deprived of the AP wire service, but also that all member papers were forbidden to supply it with news on an exchange basis. The Court held:

> "While it is true in a very general sense that one can dispose of his property as he pleases, he cannot 'go beyond the exercise of this right, and *by contracts or combinations, express or implied*, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.' ... The Sherman Act was specifically intended to prohibit independent businesses from becoming *'associates'* in a *common plan* which is bound to reduce their competitor's opportunity to buy or sell the things in which *the groups* compete. Victory of a member of such a *combination* over its business rivals achieved by such *collective means* cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* 'enterprise and sagacity'; such hampering of business rivals can only be attributed to that which really makes it possible—*the collective power of an*

[55] *See* Neale, *supra* at 68-72.

unlawful combination." 326 U.S. at 15 (emphasis added).[56]

In sum, the decision below propounds a radically new and totally unprecedented principle of antitrust law which, if affirmed, would drastically alter the ground rules by which business is conducted in this country. The district court's holding in this regard is predicated upon its finding that Otter Tail had "dominance" over transmission with respect to two towns (Elbow Lake and Hankinson),[57]

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[56] Gamco, Inc. v. Providence Fruit & Produce Building Inc., 194 F.2d 484 (1st Cir. 1952) (*see* A. 39; Neale, *supra* at 132), again involved a jointly controlled facility—this time a building used as a marketplace and operated, in effect, as a cooperative by wholesale fruit and produce merchants in the City of Providence. A price-cutting wholesaler brought suit against the jointly owned building corporation upon the latter's refusal to renew his lease. While the court found that the exclusion of this wholesaler from the marketplace violated the Sherman Act, the decision is plainly predicated upon the facts of joint ownership and concerted conduct involved in that case. The court certainly did not suggest that an individual vendor who had his own building would have to grant access to competitors. Macy's is under no antitrust duty to give floor space to Gimbel's, even if Macy's happens to be the only department store to open an outlet in a particular suburban community.

[57] The district court discusses at some length the number of miles of the various types of transmission lines included in Otter Tail's system. (A. 34-36). All of these lines taken together amount to only 8% of the total mileage of electric lines in Otter Tail's marketing area. *See* page 9, *supra*. Furthermore, although the court found that Elbow Lake and Hankinson could not be served by 12.5 kv. lines (A. 36), the fact is that such distribution facilities were perfectly adequate with respect to all four of the other towns which the district court considered in any detail. *See* pages 8-9, *supra*. The record thus contains no evidence that Otter Tail had dominance over transmission with respect to a single town other than Elbow Lake and Hankinson. As demonstrated above, Otter Tail in fact did not even have dominance with respect to these municipalities. *See* pages 8-13, *supra*.

both of which had feasible (although somewhat more expensive) alternatives available. *See* pages 10-12, *supra*. On this basis, a business would be under an obligation to allow access to any advantageous capital asset (whether a distribution system, a laboratory, or a trade secret) wherever such use would be economically desirable for its competitors. Surely Congress never intended that the Sherman Act compel such a sweeping communalization of private property.

6. The district court likewise erred in holding that Otter Tail's refusal to furnish wholesale power to municipalities is unlawful under the "refusal to deal" cases. (A. 38, 39). *See Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *United States* v. *Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945). These cases, in effect, provide an analogue in the unregulated sector to the statutory duty to serve in regulated industries. It has never been suggested that such decisions are applicable where, as here, there is a specific legislative enactment setting forth the circumstances and conditions under which the duty to sell at wholesale may be decreed. *See* Point I, *supra*. Furthermore, none of the "refusal to deal" cases require that a company which is in the business of selling at retail must sell at wholesale to its competitors or former retail customers. Combined with its holding as to wheeling, this aspect of the lower court's decision would, for example, require a department store to aid potential competitors by furnishing them with both retail outlets and stocks of merchandise at wholesale prices. No court has heretofore even suggested that this is the law.

7. The district court again erred in holding that Otter Tail's contracts with the Bureau of Reclamation and various rural electric cooperatives were illegal *per se*

because the parties agreed to allow their transmission lines to be used for certain purposes, but not for the transmission of competing energy to their existing customers. The court assumed, without analysis, that such arrangements constitute agreements "to allocate customers or territories". (A. 43). In fact, they are nothing of the kind. In no case did any party bind itself to refrain from selling in any area or from soliciting the business of any customers. *Cf. United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Montana-Dakota Utilities Co.* v. *Williams Electric Cooperative*, 263 F. 2d 431 (8th Cir. 1959). All that the parties did was to allow others to use their property upon the reasonable condition that the facilities in question would not be utilized to harm them competitively. If any supplier wished to compete without using the other's property—that is, by building its own lines or using those of a third party—it remained perfectly free to do so.

Unlike market allocations, conditions such as those at bar which are ancillary to the purchase or use of another's property, have never been held to violate the antitrust laws. On the contrary, the legality of such restrictions has been recognized in innumerable decisions both before and since the enactment of the Sherman Act. As stated by Judge (later Chief Justice) Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899):

> ". . . covenants in partial restraint of trade are generally upheld as valid when they are agreements . . . by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold. . . ."

Similarly, as this Court held in *Oregon Steam Ship Navigation Co.* v. *Winsor*, 87 U.S. 64, 68 (1873):

> ". . . a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable

region or distance, so as not to interfere with his said business or trade, is also valid and binding."

See also Tri-Continental Finance Corp. v. *Tropical Marine Enterprises, Inc.*, 265 F.2d 619 (5th Cir. 1959).

The agreements to allow the use of transmission lines in the instant case are legally indistinguishable in this regard from any other form of lease of real or personal property. They are thus governed by the well settled principle of the common law, which was codified by the Sherman Act (*Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 498 (1940); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179 (1911); *Addyston Pipe & Steel Co.* v. *United States*, 85 F. 271, 279, 281-282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)), that a covenant by a lessee not to use the leased property to compete with the lessor, is not an unreasonable restraint of trade. *See* RESTATEMENT OF CONTRACTS § 516 (1932); 6A CORBIN ON CONTRACTS § 1389 (1962); 14 WILLISTON ON CONTRACTS § 1642 (3d ed. 1972). *See also Handfinger* v. *Stevelaw Realty Corp.*, 102 N.Y.S. 2d 688 (Sup. Ct. 1950); *California Bldg. Co.* v. *Halle*, 80 Cal. App. 2d 229, 181 P.2d 404 (Dist. Ct. App. 1947). Numerous other decisions upholding a wide variety of restrictions on the use which may be made of leased premises by the lessee are collected in Annot., 148 A.L.R. 583 (1944).[58]

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[58] A covenant not to compete on the part of the lessor similarly does not constitute an unreasonable restraint. Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F. 2d 251 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); Annot., 97 A.L.R.2d 4, 14 (1964). *See also, e.g.*, Utica Square, Inc. v. Renberg's Inc., 390 P. 2d 876 (Okla. 1964); Uptown Food Store, Inc. v. Ginsberg, 255 Iowa 462, 123 N.W.2d 59 (1963); Vaughan v. General Outdoor Advertising Co., 352 S.W.2d 562 (Ky. 1961); Nagy v. Ginsberg, 282 App. Div. 842, 124 N.Y.S. 2d 400 (2nd Dep't 1953); Berman v. Bergenfield Plaza, Inc., 16 N.J. Super. 520, 85 A. 2d 222 (Super. Ct. 1951); Lien v. Northwestern Engineering Co., 73 S.D. 84, 39 N.W.2d 483 (1949); Goldberg v. Tri-States Theatre Corp., 126 F. 2d 26 (8th Cir. 1942).

(footnote continued on following page)

In short, the district court fundamentally misconceived the nature of the contracts in question, and thus erred as to the consequent legal effects.

8. Throughout its decision, the district court relies exclusively on mechanical *per se* concepts and eschews any reasoned analysis based upon the particular economic realities and congressional objectives relevant to electric utilities. The court thus disregards the special problems of "those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation." *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 92 (1953). As one court of appeals has observed, the enactment of Part II of the Federal Power Act "evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are

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(footnote continued from preceding page)

Similar restrictions have been upheld with respect to vendees of real property, *see, e.g.*, Boughton v. Socony Mobil Oil Co., 231 Cal. App. 2d 188, 41 Cal. Rptr. 714 (Dist. Ct. App. 1964); Colby v. McLaughlin, 50 Wash. 2d 152, 310 P.2d 527 (1957); Carneal v. Kendig, 196 Va. 605, 85 S.E. 2d 235 (1955); Staebler-Kempf Oil Co. v. Mac's Auto Mart, Inc., 329 Mich. 351, 45 N.W.2d 316 (1951); Calumet Council Bldg. Corp. v. Standard Oil Co., 167 F.2d 539 (7th Cir. 1948); Dick v. Sears-Roebuck & Co., 115 Conn. 122, 160 A. 432 (1932); Hodge v. Sloan, 107 N.Y. 244, 17 N.E. 335 (1887), and vendees of chattels, *see, e.g.*, United States v. Newbury Mfg. Co., 36 F. Supp. 602 (D. Mass. 1941), *motion to vacate judgment denied*, 123 F.2d 453 (1st Cir. 1941); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631 (1937); Meyer v. Estes, 164 Mass. 457, 41 N.E. 683 (1895); Gano v. Delmas, 140 Miss. 323, 105 So. 535 (1925), as well as vendors, *see, e.g.*, Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 86 S.E. 2d 128 (1955); Bogart v. Caldwell, 66 So. 2d 629 (La. Ct. App. 1953); Raney v. Tompkins, 197 Md. 98, 78 A. 2d 183 (1951); Lampson Lumber Co. v. Caporale, 140 Conn. 679, 102 A. 2d 875 (1954).

monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business." *Pennsylvania Water & Power Co.* v. *FPC*, 193 F.2d 230, 234 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952).

The irrational results flowing from a simplistic application of antitrust to the complex facts of a regulated industry are proof positive that antitrust is inapposite to the issues at bar, that the procedures and criteria set forth in Section 202(b) must be deemed exclusive as to compulsory wholesaling and that the congressional policy against forced wheeling must not be subverted. Thus, the district court's imposition on Otter Tail of an absolute duty to sell at wholesale and wheel to all municipalities, regardless of the circumstances, not only contravenes Congress' intent; it also directly subverts the most essential objectives of the Federal Power Act. For example, the court refused even to consider the erosion and possible destruction of Otter Tail's business as a factor relevant to its decision. (A. 45). It thus failed to take account of the effects of its Judgment on those of Otter Tail's customers who either do not wish, or are unable, to establish their own power companies. An electric utility is able to furnish economic service only if enough customers are available to share the fixed costs of generation and distribution. As municipalities begin to opt out of Otter Tail's system, those who remain will necessarily have to pay increasingly higher rates to maintain service. It would be difficult to conceive of a result more at odds with the aim of protecting "power consumers against excessive prices" which this Court has recognized as a "major purpose of the whole [Federal Power] Act." *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414, 418 (1952).

The district court invoked a similar *per se* rule to condemn Otter Tail's contracts with the Bureau of Reclamation and rural electric cooperatives. (A. 43, 95, 98, 99, 208, 209). As a result, Otter Tail is enjoined from enforcing

or claiming any rights under these agreements, and utilities will be unable to enter into any similar arrangements in the future unless they are willing to risk having their own facilities used against them. The district court's blind application of antitrust has thus created a major obstacle to "the voluntary interconnection and coordination of facilities" which Congress has expressly sought "to promote and encourage." Federal Power Act § 202(a).[59]

In sum, the district court's decision is totally at odds with the principles which Congress intended to govern in an area of crucial importance to the national welfare. The simple fact is that no *per se* rule can assure "an abundant supply of electric energy throughout the United States" in accordance with Federal Power Act goals. This objective can only be achieved by the specialized expertise and informed discretion of the FPC operating within the regulatory framework which Congress provided. The district court has in effect sought to use a sledgehammer on a mechanism requiring the careful application of precision tools. The resulting chaos is unjustifiable as a matter of antitrust, and destructive of the nation's welfare.

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[59] The district court has even applied an erroneous *per se* notion to enjoin the exercise of essential constitutional rights. As a result, and even though it has never abused judicial processes, Otter Tail is permanently and unconditionally barred from seeking judicial redress in the protection of its business.

CONCLUSION

For The Reasons Stated Above, The Decision Below Should Be Reversed And Remanded With Instructions To Dismiss The Government's Complaint.

Respectfully submitted,

CYRUS A. FIELD
DAVID F. LUNDEEN

Field, Arvesen, Donoho, Lundeen & Hoff
Fergus Falls National Bank Building
Fergus Falls, Minnesota 56537

MILTON HANDLER
MICHAEL D. BLECHMAN

Kaye, Scholer, Fierman, Hays
& Handler
425 Park Avenue
New York, N. Y. 10022
Attorneys for Otter Tail
Power Company

ADDENDUM

A. Legislative History of Part II of the Federal Power Act.*

1. Proposed Wheeling Sections Eliminated from Part II of the Federal Power Act During Consideration of the Act by Congress in 1935.

"SEC. 202(a). It shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor; and to furnish and maintain such services and facilities as shall promote the safety, comfort, and convenience of all its customers, employees, and the public, and shall be in all respects adequate, efficient, and reasonable.

* * *

SEC. 203(b). Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a public utility to make additions, extensions, repairs, or improvements to or changes in its facilities, to establish physical connection with the facilities of one or more other persons, to permit the use of its facilities by one or more persons, or to utilize the facilities of, sell energy to, purchase energy from, transmit energy for, or exchange energy with, one or more other persons. Where any such order affects two or more persons, the Commission may prescribe the terms and conditions of the arrangement to be made between such persons, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them." (House Hearings at 32; Senate Hearings at 40)

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* *Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. (1935) ("House Hearings"); *Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 1st Sess. (1935) ("Senate Hearings").

Addendum

2. Opposition to Proposed Wheeling Sections at House and Senate Hearings

a. EXCERPTS FROM HOUSE HEARINGS

(i) Submission of Electric Bond & Share Co.

"That the furthering of unfair competition and ultimate public ownership is one of the objects of this bill is also shown by the attempt therein to make a privately owned utility a common carrier directed to transmit energy for a publicly-owned utility to be sold to the public in competition with a privately-owned utility. The latter, of course, will be heavily taxed and compelled to maintain fixed schedules of rates and forbidden to discriminate, while the former is tax free and may charge whatever rates it pleases at any moment, and discriminates at will.

And, marvelous to relate, this bill purports to grant to the Federal Power Commission absolute authority to order and direct the privately-owned utility to build and maintain at its own expense transmission lines to carry the electric energy of its publicly-owned competitor. In this connection it is of interest to note that the much-advertised Grand Coulee Dam is within the boundaries of the territory served by this company." (at 1226)

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"The common carrier principle, which it is proposed to apply to electric utilities (202a, 203b), is in fact practicable of application only to commodities which can be stored between production and shipment and between delivery and use, and to items such as wire messages, subject to deferred or delayed delivery. The principle is physically impracticable as applied to electric energy, where production, transmission and use are simultaneous in time and are physically interrelated operations. Electric utility generating stations and transmission lines are designed and operated as a coordinated unit for the sole purpose of

supplying energy to the consumers connected to the system. These facilities cannot be used simultaneously for that purpose and for common-carrier service over which the utility's operators have no control. An attempt to enforce such service would impair and sacrifice service to the utility's own customers. Furthermore, in the electric utility industry as it now exists, no economic need for any such service has arisen.

The only practical use for these regional control provisions and common carrier provisions would seem to be to force privately owned utility systems to serve as outlets for power from competing Government projects." (at 2291-2292)

(ii) Submission of Pennsylvania Power & Light Co.

"In addition to its authority to supervise and regulate, the Federal Commission is given power to control the development of the utility by requiring additions and extensions, interconnections with others, use of its facilities by others, and the sale or purchase of current. Such requirements are beyond anything that regulation heretofore has sought to accomplish and, I think, beyond its proper sphere. When we bear in mind that the 'others' may be governmental agencies, it is easy to see that the expenditure of the utility's money for the benefit of competitive government projects may be required. This power might also be exercised in the development of the Government's nationalization plan and thus result in one company being obliged to make investments for the benefit of other companies." (at 1278)

(iii) Submission of Central Hudson Gas & Electric Corp.

"Analysis of the bill, however, discloses that the common carrier provision might be availed of for unfair com-

petition in the company's franchise territory in ways which may not be intended by the drafters of the bill. For example, while municipalities are by definition excluded from the 'persons' who may require common carrier service, there is nothing to preclude the possibility of a neighboring utility or, indeed, the Federal Government or a Federal agency, from requiring the common-carrier service for delivery and distribution and competition in the company's own territory. It could even result that a large industrial customer, located in the company's franchise territory might purchase energy from outside our territory and, under the common carrier provision require its transportation to its own plant over our system in competition with our own service. We feel that the common carrier provisions of the bill should be eliminated." (at 1306-1307)

(iv) Testimony of Henry I. Harriman, President of United States Chamber of Commerce.

"There is another feature of title II to which I strongly object. Sections 202 and 203 make electrical companies common carriers. There are physical reasons which make the common carriage of electricity impracticable. Few transmission lines have spare capacity at peak hours, and any electricity transmitted over lines must be under complete control as to voltage, power factor, frequence[sic], and so forth. Such control would be extremely difficult if the transmitted electricity is owned and generated by more than one company. Furthermore, under its provisions, an existing company might be heavily burdened financially to construct new lines for the carriage of electricity of another company.

If you desire I shall be glad to present specific amendments covering the several matters I have touched upon in this statement." (at 1562)

Addendum

(v) Submission of National Association of Mutual Savings Banks.

"Paragraph (b) gives the commission authority to require additions, extensions, or changes in facilities, to establish physical connections with other facilities, 'to permit the use of its facilities by one or more other persons or to utilize the facilities of, sell energy to, purchase energy from, transmit energy for, or exchange energy with one or more other persons.'

The apparent intent of the act is to give power to the commission to arrange eventually the various utility companies into regional districts and to limit or extend the territory in which such utility company might operate, and consequently to have a very important bearing upon the investment value of that utility. Here again arises the question as to whether, under the specific language of the act, the commission might not require a privately owned utility to establish physical connections with the facilities of a publicly owned electric utility or to permit the latter to utilize the facilities of the privately owned electric utility, or make any other arrangement in connection with the use of the facilities that the commission might deem proper. It seems to us that the potentialities of this particular provision are far reaching from the standpoint of possible danger to our investments.

Section 202 of the act makes a common carrier out of a public utility engaged in transmitting energy and charges it with the duty of furnishing or exchanging or transmitting energy for any person upon reasonable request. This language apparently would require a public-utility company engaged in the transmission business to exchange and transmit energy offered to it by a competing production and transmission company, as part of its duty as a common carrier, even to the extent of permitting this competitor to require it to transmit energy in competition with it for sale to a local distribution company.

Addendum

It would seem entirely reasonable that a public utility engaged as a common carrier in transmitting energy should be required to furnish its own energy to a local distribution company, as obviously the public interest would not sanction any interruption in service because of some disagreement as to contractual relationship, but the proposition that the transmission company must transmit for competitors electrial energy for sale to its own retail distributors seems to us to be somewhat far-reaching in its effect and might damage the securities of the operating companies.

There is another angle in connection with the declaration that a transmission company is a common carrier which it is important to consider. If we are correct in our understanding of this language it would seem possible that a governmental enterprise such as the Tennessee Valley Authority might require a transmission carrier to exchange electrical energy with and transmit the energy for it to local distribution companies or to local municipal plants." (at 1785)

(vi) Testimony of Congressman Everett Dirksen.

"Third, by the terms of this act, it interprets the commerce clause of the Constitution as conferring power upon the Government to declare public-utility transmission lines as common carriers. Under such an interpretation, such electric transmission lines would be compelled to carry electricity produced by others, which simply means that such private electric companies would be compelled to transmit electricity produced at a Government owned and operated generating plant such as the Muscle Shoals plant. Read in the light of the long-range proposal to build many other Government plants in various parts of the country, it might result ultimately in the sale of electricity in Illinois that was produced at Muscle Shoals or some other State. Since

the utilities of Illinois use in excess of 4½ million tons of coal annually, this prospect might eventually have an important bearing on coal miners, coal operators, and railroads of Illinois." (at 1909)

(vii) Submission of National Coal Association.

"The National Coal Association desires also to point out briefly that as title II of H.R. 5423 is now drafted, an intent might easily be inferred to put the Federal Government into the power business on a huge scale. The principal objection to such a proposal would, of course, be voiced by the private utilities which would find Government-produced power transported for the Government over their private lines at rates fixed by the Government, sold in direct competition with energy which they themselves were producing. The highly probable result of any such competitive distribution of energy would be complete domination of the power supply field by the Government with private operators no longer able to maintain any position in the field.

Appalling as this prospect may be from the standpoint of the private operator, the proposal has still another aspect which is almost equally alarming. It is reasonable to conclude that the electric energy produced by the Government would be hydroelectric power and that as a result the coal production and consumption of the United States would fall off rapidly and sharply. If such a situation arose, and as the measure is drafted, this seems probable, the above discussion would immediately apply. As the Government continued to dominate the field of power production and distribution with hydroelectric power, employment in the coal industry would suddenly diminish, quickly producing the very result which the country has come to fear and which the administration and Congress have been constantly endeavoring to avoid and correct." (at 1913)

Addendum

b. Excerpts from Senate Hearings

(i) Testimony of T. Justin Moore, Vice President and General Counsel of Virginia Electric & Power Co.

"Senator Bone. Suppose the common-carrier feature of this were eliminated, and one of these great pools of power, such as is being developed at Muscle Shoals, were distributed, then, on lines that are owned or built by the Government. You would still run into the same situation, would you not?

Mr. Moore. It would be very much minimized. We think that it is very unfair to include this sort of a provision, hooking it up with these pools of power.

Senator Bone. How do you think it would be minimized by eliminating that requirement?

Mr. Moore. The trouble with this requirement is that this section compels every company to connect up and carry the power that is there. In my State, for instance, Senator, we have a provision in our law in Virginia that protects a company from having to serve a competitor as a matter of State policy. This would absolutely break that down." (at 482)

(ii) Testimony of Samuel Ferguson, Chairman of the Board of Hartford Electric Light Co. and Connecticut Power Co.

"Still another radical innovation is the provision making common carriers of transmission lines. Owing to the fact that section 202(a) makes a company's lines essentially a common carrier, the State is powerless to prevent competitive companies or Federal corporations from raiding the more profitable sections of a company's territory through the use of that company's own lines. With the lean territory only remaining, the costs of serving some are increased." (at 509)

* * *

Addendum

"I am aware that Mr. DeVane testified that the bill should be amended to eliminate the privilege of using private lines for power produced by municipalities but he was careful to retain the privilege for Federal corporations such as the T.V.A. This privilege he also retained in the futile amendment which he offered in his testimony before the House committee. In our territory the Connecticut Valley Authority, to be created under H.R. 4979 now before Congress, would have the privilege of using our lines to transmit its power to any municipality that might desire to take advantage of the Federal P.W.A. grants and create a distribution system which would take from us our customers within the densely populated town limits, leaving us to serve the lean, unprofitable portion on the outskirts." (at 511)

(iii) Testimony of Wendell Willkie, President of Commonwealth & Southern Corporation.

"MR. WILLKIE. It depends on what you mean by that. For instance, with this common-carrier provision as it is in there, it is unbelievably destructive. I think there are some other provisions—

THE CHAIRMAN. You feel that the common-carrier provision, for instance, would be a bad thing because it might compel you to take power from some company or some governmental agency or city that you do not want, and it would be taking your property without due process of law.

MR. WILLKIE. Yes." (at 618)

(iv) Testimony of Fred N. Oliver, Counsel, National Association of Mutual Savings Banks.

"In connection with title II, that is, the part of the bill which purports to regulate operating companies, we feel that the questions of regulation and the direct effect of

regulation can be better interpreted by the utilities themselves. However, there are two provisions in this bill which, if we interpret them correctly, may impair the integrity of underlying obligations. I wish to make reference first to section 202, beginning on page 105 and extending to page 106. Apparently subsection (a) is intended to require that any operating utility subject to the jurisdiction of this title shall become a common carrier and shall transmit electrical energy for other companies. If that is the intent of the section, it seems to us that it may eventually impair the integrity of some of our securities. It would enable a competitor, for instance, to require another common carrier to transmit electrical energy and to compete with that competitor in the furnishing of electrical energy to some local distribution company." (at 650)

(v) Statement of S. R. Inch, President of Electric Bond & Share Co.

"Neither common carrier nor common purchaser obligations can be imposed on electric or natural gas utilities except as a means of forcing them to make their facilities available to others who would seek to use them as common carriers for the purpose of raiding their existing markets or of forcing them to purchase from others electricity or natural gas to be sold to their own customers at the expense of the shutting down of their own sources of supply.

Any competent engineer familiar with the electric and natural gas industries will confirm this obvious statement and will be able to distinguish between the important possibilities of joint use by means of carefully considered and economically feasible interconnection between systems of diverse ownership and the thoroughly impracticable idea of applying common carrier and common purchaser requirements to services which by their nature can be made subject neither to storage nor to delayed delivery." (at 1032)

Addendum

3. Testimony of the Draftsmen of Part II of the Federal Power Act

a. ROLE OF SOLICITOR DEVANE AND COMMISSIONER SEAVEY

"MR. DEVANE. Commissioner Seavey and myself, of the Federal Power Commission, were the two persons to whom the Commission delegated the responsibility for this work. I would like to say, however, that to neither of us belongs the credit, if we may call it credit, for the language that is in the bill, because we have had a great deal of assistance from members of the Commission and from members of its staff. This title has been worked over very seriously and very earnestly." (House Hearings at 552)

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"MR. DEVANE. Mr. Corcoran explained to you yesterday how title I was prepared and its purpose. He also made reference to the fact that title II of the bill was prepared by the Federal Power Commission, and as Solicitor for that Commission I participated in the preparation of title II of the bill." (Senate Hearings at 223)

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"MR. WOLVERTON. Did you participate in the drawing of this bill?

COMMISSIONER SEAVEY. Yes; I worked on it along with many others.

MR. WOLVERTON. Who were the others?

COMMISSIONER SEAVEY. They were the legal department, our legal department, and members of the Commission, and our engineers were consulted about certain practical phases; our accountant was consulted, and generally, so far as the Commission is concerned, we took in the whole staff of the Commission.

Now, in addition to that, together we consulted the chairman of this committee, Mr. Rayburn; discussed the policies and the provisions of the bill, and also consulted

the legislative counsel and Dr. Splawn. I do not know whether I can remember anybody else or not.

MR. WOLVERTON. Did you all sit in one general group, or merely consult one another at different times?

COMMISSIONER SEAVEY. We sat in a general group a part of the time, and by several groups, that is, by smaller groups.

MR. WOLVERTON. After a title or article had been drawn, was it submitted to the Federal Power Commission for its approval?

COMMISSIONER SEAVEY. Yes; the Federal Power Commission approved of it. That is, they indicated their approval of the bill." (House Hearings at 400)

b. EXCERPTS FROM TESTIMONY OF SOLICITOR DEVANE AT HOUSE HEARINGS.

"MR. WOLVERTON. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

MR. DEVANE. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear. We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes: One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.

We have, insofar as State, municipal, or Government projects are concerned, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. If we have not and it is the desire of Congress not to bring Government projects under the jurisdiction of the Commission, or give

the municipal or governmental projects the right to use the transmission lines of private industry—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement.

MR. WOLVERTON. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?

MR. DEVANE. No, sir.

MR. WOLVERTON. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

MR. DEVANE. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in." (at 514-515)

* * *

"MR. DEVANE. Mr. Chairman and members of the committee, I will now pass to a consideration of that part of the bill which has reference to the creation of geographical integrated operating systems.... Section 202(a), around which considerable discussion has centered is the subsection that makes these utilities common carriers of electric energy. . . .

MR. BULWINKLE. I believe you stated as to 202(a), that in your opinion, that did not give any municipality or State

or Government plant the right to use the utilities, the wires, transmission wires of any private company?

MR. DEVANE. That is true, sir: and if there is any doubt about it my suggestion was that it might be amended to make it definite in that respect.

MR. BULWINKLE. May I not suggest to you, that you furnish me, if you can, with an amendment to that effect?

MR. DEVANE. I will be pleased to undertake that, sir. I think the bill accomplishes that result, but it can be stated another way which may be more definite and clear, if that is considered desirable." (at 531)

* * *

"MR. DEVANE. Subsection (b) provides: [quotes proposed Section 203(b), set forth at Add. 1, *supra*].

MR. BULWINKLE. That is very strong wording, is it not?

MR. DEVANE. Not as I look upon it. The only thing that is in that section that may be considered in any particular new, is the transmission of energy for someone else or as it has been designated here, the common carrier principle that is written into that law.

The connections we are familiar with; this has been required between railroads; has for many years.[*]

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* 49 U.S.C. § 3(5) provides in part:

"If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected my agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

Addendum

Interconnections have been required as between telephone companies, and has been settled for many years. [*]

And, I might add that in my opinion, the principle underlying telephone interconnection and transmission is no different to the principle underlying compulsory interconnection and transmission in the electric industry; that is, the connection that is required in telephone cases, insofar as the use of telephone facilities is concerned, is not different from the common carrier principle than what is declared in this proposed bill." (at 533)

* * *

"MR. MAPES. Would the common-carrier provision of the bill work principally to the advantage of municipally owned and governmentally-owned projects, or to the advantage of privately owned projects?

MR. DEVANE. The common-carrier principle that is contained in this bill is intended for the private plant insofar as compulsion is concerned.

MR. MAPES. Is it the purpose to compel the privately owned transmission companies to carry the energy of municipal projects as well as private projects?

MR. DEVANE. No, sir; I thought I had made that very clear. If I did not, I want to make it very clear now. It is not intended to give the Commission power to require the

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*47 U.S.C. § 201(a) provides:

"It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."

private lines to take on any power generated by municipal plants or by any Government plant.

Now, that is a policy for Congress to determine; but so far as the Federal Power Commission is concerned, it is not asking or seeking that authority, and this bill does not propose to give the Commission any jurisdiction over that kind of a case.

MR. MAPES. The Commission does not propose it; and in your opinion the bill does not allow it?

MR. DEVANE. The bill does not, and if there is any doubt about it, the bill should be amended in that respect, and I have promised to try to draw other language that will accomplish it." (at 546)

* * *

"MR. PETTENGILL. Mr. DeVane, I want to compliment you upon the patience with which you have stood here for almost 4 hours and answered every question we have asked, and we are asking them only for the purpose of obtaining information. We do not know as much about this as you do. I would like to ask you this question: Here is a market, let us say (indicating) in my home city; here is a generating plant, and we will say that that entire market is being supplied by this generating plant, and it is capable of furnishing sufficient power.

Here is another generating plant owned by a competitor of this one (indicating and illustrating), and does not have access to this market. It has no transmission lines. Now, do you agree that by order of your Commission you may require this company (indicating) to carry that generating plant's (indicating) energy to that market in competition with the original company?

MR. DEVANE. No, sir; if I understand your question, the answer to that is 'no.'

MR. PETTENGILL. Well, section 202(a), makes it the duty of every public utility to transmit energy for any person,

and so forth, and to furnish and maintain such services and facilities, and so forth. Now, how do you distinguish the language of the bill from the illustration that I have drawn?

MR. DEVANE. You are talking about the power now; you are talking about a power to compel transmission?

MR. PETTENGILL. Yes.

MR. DEVANE. Power to compel carriers to transmit energy?

MR. PETTENGILL. Yes.

MR. DEVANE. That power is complete insofar as it may require transmission in certain cases. There is nothing in this bill, however, that provides for competition. It is entirely silent in that respect and differs from the language of the Interstate Commerce Commission, if that is what you may have in mind.

There, as you recall, Congress provided that competition should be preserved and if Congress should desire to establish competition in this industry it should be written in any legislation adopted by Congress. There is nothing in this bill that permits one utility to enter another utility's field and in doing so to require the other utility to transport its power for the purpose. There is nothing like that in this bill.

MR. PETTENGILL. And, if the language is capable of that interpretation, you are willing to have it clarified or excluded?

MR. DEVANE. If that is necessary for the purpose of clarification, yes; but when I make these concessions, as we move along here, I want it clearly understood upon the record, that I think this bill is not ambiguous, and I think the bill accomplishes the purposes that I have stated.

MR. PETTENGILL. Well, what sort of situation would the language of 202(a) apply?

MR. DEVANE. Two hundred and two?

MR. PETTENGILL. Which requires every public utility to transmit energy for any persons.

Now, on the face of the bill, does not that require this line (indicating), the generator furnishing this market, to carry its competitor's energy into that market, if they can get your consent for it?

MR. DEVANE. We will take a company that lies between one producing energy and another needing energy, and we will assume that the middle company cannot furnish the needed energy to its neighbor but has facilities that are available for transmitting the energy from the producing company to the one in need. The Commission could require the use of those facilities in order to meet that situation.

MR. PETTENGILL. But not to take the company that owns the line; not to take its market away from it?

MR. DEVANE. No, not to take the market away from it; no, sir." (at 554-555)

* * *

"MR. PETTENGILL. Let us say that is true. Suppose this company [indicating] wanted to drive that company [indicating] out of business and was willing to deliver the power to this market [indicating] much below cost?

MR. DEVANE. That is one of the things that this bill would prevent. We are seeking regulation. We are not seeking lower rates through competition." (at 556)

* * *

"MR. LEA. Mr. DeVane, what power would be given by the provisions of this bill for the Commission to equalize competitive rates?

MR. DEVANE. There is no power to equalize competitive rates, Mr. Lea.

MR. LEA. Is there no method provided for taking care of that?

Addendum

MR. DEVANE. The bill is not drawn upon the theory that competition shall be established in the industry." (at 558)

• • •

"MR. HUDDLESTON. Yes. So that you may understand my point of view, I wonder just what was the purpose of that clause, and how important it would be to the regulation of this industry.

MR. DEVANE. The problem that we had when we were asked to submit a draft of this legislation was the question as to how far we should go in covering these difficult subjects. The greatest attack that has been made on this bill has been made upon the introduction into it of the common carrier idea and the power over extensions and additions requiring certificates of convenience and necessity. The industry has made the claim that it takes away from them the management of their property.

What was our duty in the premises? Now we approached this matter in this way, Mr. Huddleston; we concluded to submit a bill that brought to your attention all of the features of this business that should be regulated and should you conclude after hearings that certain matters need not be covered at this time they could be eliminated, but we could not be charged with having failed to call them to your attention." (at 2147)

• • •

"MR. DEVANE. Let me say this, however, Mr. Huddleston. I think that one of the difficulties in the railroad field was the failure to give to the Interstate Commerce Commission that jurisdiction much earlier than it got it. Had the Commission had it much earlier, I believe, we would not have much of the bad situation that exists today with the railroads.

In the electrical industry you have the same situation but for a different reason. In the railroad industry, you

must recollect, by the Interstate Commerce Act, you attempted to preserve competition; the fact that there is duplication of the service between the Baltimore & Ohio and the Pennsylvania Railroad between here and New York was recognized and permitted to exist; and the theory was that there must be duplication of service as long as you preserve competition between the railroads.

MR. HUDDLESTON. But we abandoned competition in 1920.

MR. DEVANE. If you had abandoned it long before we might have saved the situation that confronts a great many railroads today.

Now in this industry we do not have that particular problem because this industry is monopolistic; it enjoys a franchise, and by and large has no competition, so far as the particular field in which it operates is concerned, but what this bill recognizes is that there is a need in this industry to control the amount of standby facilities which enters very largely into the cost of service and unless we can control it at this time it may have a very serious effect upon it in the future." (at 2148)

* * *

"Now I do not think that regulation should ever go too far. It is the only regulation in the public interest that will ever be worth anything. I do not believe that this bill, is subject to that construction or to the criticism that it takes the management of the business away from the company or that it supersedes their management with commission control. All that it does or intends to do is to set up standards of regulation. The main thing the bill accomplishes through present language, or that should be accomplished by a rewriting of the bill, is to grant to a Federal commission the authority to do these things:

First, to fix wholesale rates; second, to establish regional districts and require physical connection between

the companies; third, to have supervision and control over the issuance of securities; fourth, to have sufficient supervision and control over the construction of facilities to prevent unnecessary construction, and to prevent improper abandonment; fifth, give to the commission the power to make investigations for the purpose of determining the investment in the property of this industry; sixth, control over the accounts of these companies; seventh, authority to secure information that the States need in their regulation of these utilities; and eighth, authority to obtain information that this Congress might need similar to that which is now being collected for Congress under the power survey and rate survey.

Now those are the things that in my mind are fundamental. The bill contains provisions in it that go beyond that—provisions that some day you will adopt, whether you do it this year or next year or several years hence is a question that you will have to decide now as the bill includes them." (at 2156)

* * *

MR. COLE. Before you go on, may I ask you this question? You said a moment ago that the practice of some public utilities in the country has been to become common carriers, and that practice still exists. Does that come about as the result of the operation of State laws?

MR. DEVANE. No.

MR. COLE. Voluntarily?

MR. DEVANE. Voluntarily. I have inserted in the record illustrative cases; there are 5 or 6 of them." (at 2164-2165)

c. EXCERPTS FROM TESTIMONY OF SOLICITOR DEVANE AT SENATE HEARINGS

"SENATOR HASTINGS. Is it the purpose here to give authority to the Commission, for instance, to cause a plant

to be closed down if they find that it cannot transmit energy across the State line as cheaply as some other plant can, to the same place?

MR. DEVANE. You mean and give the other plant the business?

SENATOR HASTINGS. Yes.

MR. DEVANE. No.

SENATOR HASTINGS. You cannot do that under this bill?

MR. DEVANE. We cannot do that under this bill. In that connection, there was one representative of the industry who suggested that it might be possible under the common-carrier provision of section 202-A, for one utility that adjoins another's territory, to come in and sell surplus power at low rates as duped power [sic] to one of its customers, and then, under the bill, require it to transport such power to the customer. That should be taken care of. It is not the intention of this bill, and I do not think the bill would ever be held to give the Commission that power, or to give the utility that right. Another utility has no right to come into that utility's territory and sell its excess power to the other customers if the common-carrier provision of this section is retained in the bill." (at 258)

* * *

"SENATOR HASTINGS. May I inquire what is there about this title II that the industry does object to?

MR. DEVANE. I can tell you what they tell us they object to. I think title II, from their standpoint, is important, and they may look upon it as serious regulation. They object very much to section 202(a), which makes their lines common carriers. They object very seriously to any authority that would make them purchase or transport power from a public project, which is not in the bill but to which they devoted a great deal of their time at the House hearings. Those, as I recall, are the two chief attacks that they made on title II.

THE CHAIRMAN. Let me understand you. You say that there is nothing in the bill which compels them to transport power of a public project over their lines. Am I correct in that?

MR. DEVANE. That is right, sir.

THE CHAIRMAN. So that there is no use of their wasting any time with reference to that phase of it; and if you are agreed with them with reference to it, it seems to me that if it is not clear, if they have an amendment which will cover that, that would end it." (at 260)

d. EXCERPTS FROM TESTIMONY OF FPC COMMISSIONER CLYDE SEAVEY AT HOUSE HEARINGS

"MR. PETTENGILL. Do you construe title II as making the private power lines of the United States common carriers of electric energy?

COMMISSIONER SEAVEY. Title II?

MR. PETTENGILL. Yes.

COMMISSIONER SEAVEY. You have reference to what section?

MR. PETTENGILL. I am talking about the provisions of the bill.

COMMISSIONER SEAVEY. Common carriers; yes.

MR. PETTENGILL. It makes them common carriers?

COMMISSIONER SEAVEY. Yes.

MR. PETTENGILL. Do you know whether it is planned to use the private power lines of the United States to carry the electric energy generated at the Tennessee Valley power plants?

COMMISSIONER SEAVEY. No; this act does not go to that extent.

MR. PETTENGILL. Could that be done?

COMMISSIONER SEAVEY. It could, if Congress provided for that.

MR. PETTENGILL. Would it require any further authorization than that that is in this bill?

COMMISSIONER SEAVEY. Yes; it would require an additional provision in this act, if that were to be done.

MR. PETTENGILL. Why is that? You have just said that the power lines are common carriers.

COMMISSIONER SEAVEY. Well, the person that has that privilege under this bill is a person defined as an individual and a corporation would not come under it; it would not include a municipality or a Government power development, or the Tennessee Valley Authority.

MR. PETTENGILL. Therefore, is it your judgment then that no Government generating plant could require the use of private power lines to carry their electric energy under the terms of this bill as written?

COMMISSIONER SEAVEY. Yes, that is my opinion, except through the provisions where voluntary agreements may be entered into at which time those voluntary agreements would be supervised by the Federal Power Commission." (at 395-396)

* * *

"MR. PETTENGILL. Mr. Commissioner, you just said a moment ago that as you construed the bill, a private power line could not be required to carry electric energy generated by the Tennessee Valley Authority or a municipal plant owned by a city, or a State; is that correct?

COMMISSIONER SEAVEY. Yes; that is my understanding of the bill.

MR. PETTENGILL. Because, as you said, the word 'person' does not include a municipality or a governmental body?

COMMISSIONER SEAVEY. I think that municipalities are particularly excluded, and it is my belief that any other Federal agency, any other governmental agency, would be excluded under the terms of the bill." (at 397-398)

Addendum

4. Proposed Amendment Limiting FPC's Powers With Respect To Wheeling (Proposed during consideration of the Act in 1935)

a. TESTIMONY OF SOLICITOR DEVANE

"Let us write a new section 218 and let us say that nothing in this title shall be construed to give the Commission any jurisdiction over municipally owned or State-owned or Government-operated property; and none of the powers conferred upon the Commission in this bill shall be used to compel the transmission of energy produced by any such property. Then we will have the same declaration as to that so there will not be any question as to the intention of this bill." (House Hearings at 566)

b. TESTIMONY OF SAMUEL FERGUSON, CHAIRMAN OF THE BOARD OF HARTFORD ELECTRIC LIGHT CO. AND CONNECTICUT POWER CO.

"Owing to the fact that section 202(a) makes a company's lines essentially a common carrier, the State is powerless to prevent competitive companies or municipal or Federal corporations from raiding the more profitable sections of that company's territory through the use of that company's own lines. With the lean territory only remaining the costs of serving same are increased." (House Hearings at 1068)

* * *

"MR. WOLVERTON. Now, there is another thought that I would like to ask your opinion on, and that is this: When Judge DeVane was testifying here the other day I asked his opinion as to the effect of this bill along the same lines that I have just now asked yours. I asked the further question: In the event that a Government agency was set up would it be possible for the Government agency to utilize the transmission lines of private companies?

MR. FERGUSON. It would.

MR. WOLVERTON. That is your opinion that would be the case under the terms of this bill?

MR. FERGUSON. Clearly. Section 202(a) states specifically that it shall be the duty of every public utility to furnish energy, to exchange with and transmit energy for any person upon reasonable request therefor.

A person is defined in section 201 as an individual or a corporation. Under that term the Tennessee Valley Authority is a corporation. Under that term the Tennessee Valley is a corporation, so that the first three lines of section 202(a) it is the duty of the public utility to do so [sic].

MR. WOLVERTON. Judge DeVane stated, however, in answer to my question, that there is no intention on the part of the framers of this bill to make possible what I have just referred to, and that if language was necessary to make it clear he would suggest that appropriate language be used to change that effect; and he also, I think, made some suggestion as to the proposed language to bring about that result.

MR. FERGUSON. He did. I have it here. He said, as I remember his testimony, that there had been a question raised in the minds of the public; and he offered an amendment to eliminate that misunderstanding; and that amendment read:

> None of the powers conferred upon the Commission in this bill shall be used to compel the transmission of energy produced by any such property—

or generated by a municipally owned, State-owned, or Government-operated property.

That is the amendment that he offered.

MR. WOLVERTON. Is it your opinion that is not sufficient to cover the situation you refer to?

MR. FERGUSON. It does not cover it.

MR. WOLVERTON. It does not in your opinion remove the objection to which I have directed your attention?

MR. FERGUSON. It does not cover it at all. It merely provides that the Federal Power Commission could not compel any company to transmit such energy. All this does is to say that the power commission's powers shall not be invoked to compel it. But the power of the Interstate Commerce Commission, for instance, is not invoked to compel a railroad to accept a shipment of goods. Any Federal court can do that because that is the law. And this is the law under section 202(a)." (House Hearings at 1074-1075)

5. Declarations Made in 74th Congress in 1935 As To Purpose Of Eliminating Proposed Wheeling Sections.

a. EXCERPTS FROM SENATE REPORT

"Section 202(a) of S. 1725 imposed upon each public utility the duty to furnish energy to, exchange energy with *and transmit energy for* any person upon reasonable request. This provision has been eliminated, and the other subsections of the old section 202 which relate to rates have been removed to the general rate section (sec. 205). While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It *relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202(a)* (formerly sec. 203(a)), for the first Federal effort in this direction. The authority to compel utilities to establish physical connection with the facilities of other companies and to sell and exchange energy, now contained in section 202(b), has been limited to cases instituted by complaint of a State commission or a public utility and to cases in which both parties

to the order are interstate utilities. *Furthermore, the provisions of the old section 203(b) empowering the Federal Power Commission to require one utility to permit the use of its facilities by another,* or to make extensions or improvements *have been eliminated; these matters are left to the voluntary action of the utilities.*" S. Rep. No. 621, 74th Cong., 1st Sess. 19 (1935) (emphasis added).

b. Statements By Senator Burton Wheeler

(i) Statement at Senate Hearings

"The Chairman. I think there is something to be said with reference to the common-carrier provision. I think there is something to be said as to why it might be well to eliminate that." (at 483)

(ii) Statement on Senate Floor

"Likewise there was a provision in the bill making transmission lines common carriers. That was stricken out, I may say, at my suggestion, because I did not think that at present transmission lines should be held to be common carriers." 79 Cong. Rec. 8431 (1935).

B. Wheeling Bills Introduced and Hearings Held in 88th Through 92nd Congresses

1. 88th Congress

a. Proposed legislation: S. 350 and H.R. 2101 (identical bills)

b. Pertinent Provisions of S. 350 and H.R. 2101:

"Any certificate issued under the provisions of this subsection [proposed Federal Power Act § 202(i)] authorizing the operation of transmission facilities shall be subject to the condition that any capacity of such facilities

not required for the transmission of electric energy in the ordinary scope of such applicant's business shall be made available on a common barrier basis for the transmission of other electric energy. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such other reasonable conditions and terms as the public convenience and necessity may require."

2. 89TH CONGRESS

a. Proposed legislation:

(i) S. 1472 and H.R. 2072 (same as 88th Cong., S. 350 and H.R. 2101).

(ii) S. 2140 and H.R. 7791 (identical bills).

b. Pertinent Provisions of S. 2140 and H.R. 7791:

"[A] certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the construction, modification, extension, operation, or maintenance covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed construction, modification, extension, operation, or maintenance, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity, is consistent with a comprehensive plan for the use and development of the power resources of the area for the purpose of making electric energy reliably available in ample amounts, on fair and reasonable terms, and includes therein to the extent financially feasible sufficient capacity to meet all needs within the affected

area for transmission capacity, whether from public or private generation, including reasonable capacity for expansion to meet future loads. . . . The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

c. Excerpts from *Hearings on S. 1472, S. 2139 and S. 2140 Before the Senate Commerce Comm.*, 89th Cong., 2d Sess. (1966).

(i) Testimony of W. J. Clapp, President of Edison Electric Institute.

"S. 1472 specifically provides as a condition precedent to the issuance of a certificate of convenience and necessity that any capacity not required for the transmission of electric energy by the applicant shall be made available on a common carrier basis for the transmission of other electric energy.

To require as a condition precedent to a certificate that 'surplus' capacity in a proposed line becomes a common carrier would in effect reduce reliability of service.

In the first place, it raises the question as to who would determine the amount of 'surplus' capacity in a particular line and how. As a general rule, transmission lines are not designated to include 'surplus' capacity, as such. Capacity in excess of the load provides for a reserve in the event of an emergency.

Furthermore, transmission lines are not designed as such, but as a component of an entire system for which reserve capacity must be provided.

To have this capacity in use on a common carrier basis would encroach on this reserve capacity, and, in the event of a fault on one of the components of the system, it could

create a very dangerous situation which could jeopardize the stability of the entire system and produce a cascading type of interruption.

SENATOR LAUSCHE. What is your interpretation of the language which would require a power company to make its excess capacity available as a carrier to some other user? What if in the course of time the excess no longer existed? Would the right of the user continue as a priority over the right of the power company?

MR. CLAPP. Well, that is one of the several problems in connection with the matter of the common carrier principle, the difficulty in negotiating contracts, it would determine where the precedent would lie.

It is of a great deal of concern to us to think about having to contract out surplus capacity on the common carrier basis.

• • •

We wish to emphasize that a single transmission line is but a part of the entire system, and modification of the planning of the line or delay in permitting it to be installed could seriously affect the overall plan which component utility planners and operators have developed over a period of years.

The common carrier provision raises the very difficult problem of how all systems, regardless of size or type of ownership, could have access to the economies of scale." (at 116-117)

(ii) Submission of American Electric Power Co., Inc.

"The requirement in Senate Bill 1472, that certificates issued for operation of existing lines as well as for proposed lines not required for the transmission of electric energy in the ordinary scope of business of the owner

thereof shall be made available on a 'common carrier basis' for the transmission of other electric energy, not only makes impractical future planning, but may well invalidate much planning that has already been incorporated in existing facilities.

Sound planning and development have for many years included extra capacity, or at least the potential, in transmission lines for future loads. The feasibility of such future planning or the realization of the benefits of such planning in the past are, of course, completely discouraged and negated if such capacity is required to be made available to others.

The requirement that capacity of facilities not required for the transmission of electric energy in the ordinary scope of the Applicant's business shall be available to others on a common carrier basis seems to us to be not only unworkable, but at the same time destructive of the aims which the Commission is trying to accomplish, which must be the assurance of reliable and economic electric service.

Transmission lines, unlike railroad tracks or barge canals, are simply not susceptible to being treated on a common carrier basis. Transmission lines are constructed not merely for the purpose of moving electric energy from point A to point B. An equally important function of transmission lines in a properly designed system is to assure continuation of service in emergency situations, which, by definition, are not in 'ordinary scope' of business. To speak in terms of capacity required for the 'ordinary scope' of business is, therefore, simply meaningless. Furthermore, transmission lines, at least those in the AEP System, are frequently designed so as to move electric energy in both directions, depending upon where the need for energy at any one time may exist. This assures the possibility of using the most economic generation site at any one time and is, of course, vital to assure reliability.

Addendum

Thus, for example, energy may move northward on a north-south line at one time of day and move southward at another time of day. And while under normal conditions excess capacity may exist, under foreseeable emergencies all of such capacity may be required to assure continuation of service. Without such flexibility, the transmission lines would no longer constitute the integral part of the entire electric system which experience indicates is absolutely vital for economic and reliable service. For these reasons, we believe that to require that transmission lines be made available to others as well as to the owner thereof would make reliable and economical planning of transmission systems a virtual impossibility." (at 134)

(iii) Submission of The Southern Company.

"*Burdensome competition would be fostered and controversy promoted.*—It must be recognized that the investor-owned utility industry faces vigorous competition from federal government power marketing agencies, cooperatives, municipalities and other public bodies. The 'common carrier' provisions in the proposed legislation (S. 1472) or the FPC's conditioning power could be readily availed of by competitors to require the transmission facilities of the regulated companies to be used as a vehicle for transportation of power to permit the competing body to take away the customers of the regulated company. The regulated company may be forced to allocate part of its system to validate the otherwise inadequate system of the competitor. The legislation must be considered in the existing context of federal power marketing legislation where the competitors of the regulated companies are granted a preferential status in the receipt of government-generated power.

Addendum

S. 1472 and S. 2140 would, in effect, authorize the Commission to impose upon investor-owned utilities the burden and risk of supplying competing public-owned or REA-financed systems with transmission connections which could, and undoubtedly would, be used to take away customers of the investor-owned utilities. The legislation could be used to enable such competing systems to use their tax-free and abnormally low interest cost status to extend their service far beyond their existing markets. For example, an REA-financed generating and transmission (G & T) cooperative in the State of Alabama has already publicized its plans to extend its service to nine distributing cooperatives now served by Alabama Power Company as soon as such G & T can obtain the generating and transmission capacity to do so. With the guidance and participation of REA seven of such distributing cooperatives have already entered into 35-year contracts to take all their power requirements from the G & T when it can deliver power to them. With the proceeds of a $20,350,000 REA loan the cooperative is now engaged in the construction of a steam generating plant to be used to displace the service of Alabama Power Company to certain of such distributing cooperatives. Should S. 1472 or S. 2140 be adopted, it is probable that the FPC would be pressed to require Alabama Power Company to provide transmission line connections for the competitive benefit of the G & T cooperative as a condition of the Company's securing a certificate of convenience and necessity for lines it proposes for the purpose of serving its present customers or interconnecting with utilities in neighboring states.

It is not difficult, then, to imagine that the proposed certification legislation will bring about constant interventions before FPC, with allegations that reserve capacity in the regulated company transmission lines is 'surplus'

or 'excess', or attempting to require planning of the regulated system in such a way as to permit the competitor an advantage in taking the customers of the regulated company." (at 145-146)

(iv) Submission of FPC Chairman Lee White.

"Should the law require a 'common carrier' wheeling condition?—

S. 1472 provides, as one of the conditions upon which all certificates would be granted, that excess capacity of the certificated line be made available to others on a 'common carrier' basis. The Commission believes that this is not the best way of insuring that the benefits of the new EHV construction are equitably distributed. Under S. 2140, the Commission could insert in a certificate conditions specifically tailored to the needs of the case and a wheeling condition would very likely be appropriate in some cases. The Commission has imposed wheeling conditions before, under Part I of the Federal Power Act, and its actions have been upheld by the Courts. But this type of condition is not appropriate in every case. There is no doubt in my mind that the Commission could act more efficiently to protect the public interest if it were free to choose among methods of guaranteeing participation in the projects it would certificate to all whose participation would be in the public interest. In some cases, for example, joint construction and ownership of a line might be a better solution than 'common carrier' status imposed by statute. In others, there may be no other person who can profitably use the line's extra capacity. Under such circumstances, it seems wiser to allow the type and degree of participation by outside parties to be determined as the facts of the case dictate." (at 42)

Addendum

(v) Testimony of Senator Lee Metcalf (sponsor of S. 1472).

"SENATOR NEUBERGER. More particularly, about the common carrier provisions of your bill, would this tend to reduce the need for new lines and rights-of-way because it would encourage multiple use of existing lines?

SENATOR METCALF. Yes; it seems to me essential that there be some provision so that all people can take advantage of wheeling their power over these extra-high-voltage transmission lines. As I quoted on the first page of my statement, that today it is not the people that control generation, but it is the people who control the transmission that really control the destiny of the ratepayers of the Nation.

Now, I have quickly glanced through the testimony of Commissioner White of the Federal Power Commission and his suggestion of perhaps joint construction and negotiation of joint ventures, so that all the people concerned would go together in building a transmission line; I gather from a cursory look at his statement that would be his answer rather than making them common carriers.

And, of course, any satisfactory arrangement so that all the people who have power, who generate power, have power to transmit, should be permitted to use these lines.

We have insisted that when they build the lines across Federal land, that the Department of the Interior or the Department of Agriculture provide in their regulations that the excess transmission capacity shall be used as a common carrier and, of course, it would only be the excess transmission capacity in any event that would be used by these lines that were constructed by private utilities." (26-27)

Addendum

(vi) Statement of Congressman John Moss (sponsor of H.R. 2072).

"I reintroduced my bill in the 88th Congress (as H.R. 2101), and in the 89th Congress (as H.R. 2072). Senator Metcalf's bill (S. 1472) which your Committee is now considering, is identical to my bill.

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Senator Magnuson's bill (S. 2140) makes some modifications in the language of the Metcalf-Moss bill. These changes would extend the definition of 'person' to include public agencies, would provide the right of eminent domain, would require certificates for the modification of transmission facilities, would apply to all facilities over 200 kilovolts (rather than 230 kv), and would substitute for the common carrier provision a requirement that the facilities be consistent with a comprehensive plan for the use and development of power sources for the area.

I would accept most of these modifications. I think they are good. I think they would advance the public interest. I agree also, I want to emphasize, with the provisions of Senator Magnuson's bill that transmission facilities be consistent with a comprehensive plan for the use and development of power sources for the affected area, and that the purpose of this plan is to provide ample power on fair and reasonable terms to meet, as far as financially feasible, all needs within the affected area for transmission capacity, whether from private or public generation, including reasonable capacity to provide for future loads.

However, I disagree on the complete elimination of the common carrier provision. The 'comprehensive plan' provision is not a complete or adequate substitute. Although it indicates that the power be available for all utilities within the area, it does not specify that the power be available on a common carrier basis. The lack of such specification might lead to interpretation that would negate the common carrier concept. Therefore, I urge that the section should contain express language to make wholly clear and explicit that the transmission capacity would be available on a common carrier basis." (at 23)

Addendum

(vii) Submission of National Consumers League.

"At the present time, large electric utilities are able to build their own transmission lines, and to refuse permission to allow smaller utilities to use these lines, or to charge prohibitive rates for their use. The small utility is forced to either build its own line or pay a heavy tariff. Because the costs of smaller utilities are exaggerated by their transmission expenses, they are forced to charge higher rates. Larger companies can, therefore, charge more, increase their profit margin, and still maintain a competitive position vis-a-vis these rates. The higher costs are paid by the consumer. S. 2140 would provide that all utilities in the area have access to the transmission lines, thereby eliminating needless duplication of transmission facilities and enabling an entire area to be served by a single, or comparatively few, extra-high-voltage transmission lines." (at 143)

(viii) Submission of American Public Power Association.

"It should also be pointed out that S. 2140 does not expressly recognize the right of a system in the affected area to contract for surplus capacity in a certified transmission line, although this is an inherent element of the comprehensive plan test. S. 1472, for instance, provides that—

> Any capacity of such facilities not required for the transmission of electric energy in the ordinary scope of such applicant's business shall be made available on a common carrier basis for the transmission of electric energy.

Such a standard with respect to 'excess capacity' is also present in the right-of-way regulations promulgated by the Departments of the Interior and Agriculture. It would appear desirable to indicate explicitly that surplus capacity

shall be available as a matter of right to all users and suppliers of electricity in the affected area.

• • •

The problem which our members experienced is basically one of lack of cooperation by private power companies owning and operating transmission facilities. For instance, in the State of North Dakota a city held an election and decided to set up a municipal electric distribution system. The city had been served by a private power company. When the city made the decision to establish a municipal system, it was determined that it was cheapest to purchase power at wholesale from the Bureau of Reclamation. However, it was necessary to transmit the power some distance, and the city had no transmission lines of its own.

The city requested the company to wheel power, and the company refused to do so. The city was then placed in the impossible situation of having decided to establish a municipal system to lower its power costs, but being unable to justify construction of transmission facilities necessary to reach the Bureau directly while simultaneously confronted with a decision on the part of the utility next door that it would not serve. This is one example of the transmission problems faced by small local public power systems. There are others." (111-112)

(ix) Letter of Deputy Attorney General Ramsey Clark.

"The Department is concerned with complaints which have been received on the refusal by private power companies to transmit power for REA cooperatives, municipalities, and the Federal Government. Such refusals result in the elimination of competition and are restraints of trade. To prevent such restraints of trade where preferential rights are given, such as the exclusive right of construction or transmission and the power of eminent domain

that would be given under this bill, restrictions have been imposed upon such industries as railroads and oil pipelines. Hence, we favor an amendment to the bill to require a certificate holder to transmit power to anyone who requests it and wheel power for anyone who tenders it. However, the Federal Power Commission, in its statement before your Committee on July 27, 1966, has indicated that this type of condition is not appropriate in every case.

As an alternative we would, therefore, recommend that the bill be amended to provide that if any certificate holder refuses to transmit or wheel power the Commission shall hold hearings to determine if such refusal was justified—taking into consideration the burden upon the certificate holder to transmit the power and his duty to act in the public interest. Also, the Commission should be given the power to require the wheeling or transmission of power, prorated if necessary, where the refusal is found to be unjustified. Further, we consider it essential that a certificate holder be willing and able to service everyone who requests transmission at the time the certificate is granted." (at 9-10)

3. 90TH CONGRESS

a. Proposed legislation:

(i) S. 1834 and S. 2311 (same as 89th Cong., S. 1472 and H.R. 2072).

(ii) S. 1835 (same as 89th Cong., S. 2140 and H.R. 7791).

(iii) H.R. 12322.

b. Pertinent Provisions of H.R. 12322, § 3 (to add Sec. 411 to Federal Power Act):

"Whenever the Commission, after notice and hearing had, upon its own motion, or upon complaint, finds such

action necessary or appropriate to carry out the objectives of this part, it may by order direct any person engaged in the generation or transmission of electric energy (if the Commission finds that no undue burden will be placed upon such person thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the generation, transmission, or sale of electric energy, to sell energy to *or wheel for* or exchange energy with such persons. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including allocation of transmission capacity, reasonableness of reserves, and amount of excess capacity, and compensation for the use thereof. Nothing herein shall be deemed to modify or repeal any provision of any Federal power marketing statute." (Emphasis added).

c. Excerpts from *Hearings on S. 1934* * *and Related Bills Before the Senate Comm. on Interstate Commerce*, 90th Cong., 1st Sess. (1967).

(i) Statement of Congressman John Moss (sponsor of H.R. 12322).

"My bill, as does the FPC bill [S. 1934], authorizes the FPC, on its own motion, to compel interconnections between power systems—again giving priority to efficient public service to the consumers of a region. My bill, however, goes further, requiring each entity, public or private, to wheel power for other entities to the extent of excess capacity in its lines. For this service, it would, of course, be entitled to fair compensation." (at 16)

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* Unlike the other bills considered at the hearings, S. 1934 contained no wheeling provision.

Addendum

(ii) Testimony of Senator Lee Metcalf.

"SENATOR METCALF. One of the most thrilling examples of the potentialities of our system are the extra-high-voltage and long-range transmission facilities we are beginning to develop with new techniques such as direct current transmission. Interconnections [sic] with those connections between one power system and another power system, or between a generating system [sic] and a transmission system, permit a flow of power back and forth.

SENATOR PEARSON. And these interconnections are not subject to Federal Power regulation now?

SENATOR METCALF. Primarily they are not. There is neither the kind of requirement of interconnection control nor is there a requirement of wheeling power for one group back and forth, or territorial integrity that is essential for the development of these regional systems." (at 28)

(iii) Submission of Public Service Commission of Wyoming.

"Entwined in the above consideration is a most obviously burdening condition that would result under the Act by forcing transmission utilities to act as 'common carriers'. Among other things this again would prevent a utility from effectively planning the route, size or use of any transmission lines proposed to be built by it to meet the needs of its customers, and would deprive such utility of any protection concerning service to existing customers or potential customers." (at 492)

(iv) Testimony of Albert Carlsen, President, Idaho Power Co.

"Systems which are now buying as wholesale customers or even new entities, such as municipalities, would be en-

couraged, in fact almost directed, to go directly into the electric business, since their customers would have the dual advantage of not only low-cost money and tax-exempt status, but also the benefit of the lowest cost power obtained from the newest plants, at the expense of the private companies' customers." (at 516)

(v) Testimony of William C. Wise, Counsel, Mid-West Electric Consumers Association.

"We also think that section 411 should be amended to make certain that the rights granted to preference customers in the various Federal power marketing statuutes, it should be made clear that they are not taken away, and the Moss bill [H.R. 12322] also does that.

Most important in section 411, where the Commisssion is authorized to order interconnections, and the sale or exchange of energy with other parties, we think the word 'wheeling' should be put in there. The small consumer, the small distribution system, described by Mr. Schlenader, if it is to get real service from this, it must have the right to have power wheeled to it. We have the situation here in Utah, Mr. Schlender's own cooperative, which needs power to serve northern Utah. I'm sure you are familiar with the situation, Senator. If wheeling were put in this bill his problem would disappear. Assuming he showed the public necessity for it and it was in the public interest, that power could be wheeled down there. We think that is a very important amendment and we are very pleased that Mr. Moss has that in his bill." (at 560-561)

4. 91ST CONGRESS

a. Proposed legislation:

(i) S. 1071, H.R. 7016, H.R. 7052, H.R. 7186 and H.R. 9557 (identical bills to enact Electric Power Reliability Act of 1969).

(ii) H.R. 12585.

b. Pertinent Provision of Bills:

(i) Electric Power Reliability Act, §3, (to add Sec. 412 to Federal Power Act).

"Whenever the Commission, after notice and hearing had, upon its own motion, or upon complaint, finds such action necessary or appropriate to carry out the objectives of this part, it may by order direct any person engaged in the generation or transmission of electric energy (if the Commission finds that no undue burden will be placed upon such person thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the generation, transmission, or sale of electric energy, to sell energy to *or transmit energy* (*by displacement or otherwise*) for or exchange energy with such persons. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including allocation of transmission capacity, reasonableness of reserves, and amount of excess capacity, and compensation for the use thereof. Such determination shall be subject to all the procedures and requirements of section 405 and 410 of this Act if it involves construction or modification of extra-high-voltage facilities. Nothing herein shall be deemed to modify or repeal any provisions of any Federal power marketing statute." [*Compare* 90th Cong., H.R. 12322, *supra*]

(ii) H.R. 12585:

"SEC. 2. The Congress hereby finds and declares that

• • •

(7) all electric utilities and their customers should have access to the benefits of coordination and advancing

technology, including advances in nuclear technology financed by the taxpayers of this country and economies of scale, on fair and reasonable terms, including access by means of capacity sharing, staggered construction, coordination of facilities and reserves, wheeling, displacement transactions and other exchanges. . . .

• • •

SEC. 6 (f) ACCESS TO TRANSMISSION NETWORK.—Each electric utility which owns or operates elements of the regional and interregional transmission network shall make capacity available to all other electric utilities and their customers on fair and reasonable terms, including access by means of wheeling, displacement transactions or other exchanges. Each electric utility shall permit any other electric utility to enlarge transmission facilities, at its own expense and insofar as such enlargement may be made consistent with adequacy of bulk power supply to meet regional and interregional needs, and to utilize the increased capacity for the transmission of electric energy upon fair and reasonable terms. Upon application by any interested person and after notice and opportunity for hearing the [Federal Power] Commission shall order compliance with this subsection."

c. Excerpts from *Hearings on H.R. 7186 and Related Bills Before the Communications and Power Subcomm. of the House Interstate and Foreign Commerce Comm.*, 91st Cong., 1st & 2d Sess. (1971).

(i) Testimony of Congressman John Moss (sponsor of H.R. 7016).

"The bill encourages common use and ownership of extra-high-voltage facilities in the following way: If company A proposes to build a smaller plant for its own customers, which if increased in size could serve also the

nearby customers of company B, and more economically than either group could be served by separate plants, the FPC would be authorized to compel the two companies to construct and operate an enlarged plant for the common benefit of both groups of consumers. Similar provisions apply to transmission lines and also would require a utility having excess capacity in its existing lines to transmit the energy of another person for a reasonable fee." (at 490-491)

(ii) Testimony of R. W. Cowden, Secretary, Northern California Power Agency.

"MR. BROYHILL. I am a little bit confused here, I must admit. This has been called a reliability bill, but in your testimony you keep referring to wanting to get the benefit of low-cost power generation.

Is this bill going to help you from a reliability standpoint or is this bill attempting to lower the cost of your power? Are these two separable or are they altogether in the same ball of wax?

MR. COWDEN. Mr. Broyhill, if my testimony seemed to be slanted at accenting only the low-cost power feature, it wasn't intended.

In my statement, I hope that I brought out the fact that we support this and related bills, all of these bills. We think that reliability is very important. We think interconnection is very important. Without them, we don't think the best interests of the consumer of electricity in this country will ever be served adequately.

MR. BROYHILL. But you do feel that this bill would help you get access to other power sources?

MR. COWDEN. Yes, sir.

MR. BROYHILL. And you can't get them now?

MR. COWDEN. There is no question but that would be one of the end products; yes, sir.

MR. BROYHILL. How would this work? Would you explain to the committee how it would work under this legislation we are considering?

MR. COWDEN. As I mentioned a minute ago, sir, we are going to have to go into our own generation. We are negotiating right now and meeting with a firm called GRI on some thermal energy.

MR. BROYHILL. You wouldn't have to have this legislation in order to build your generation facility.

MR. COWDEN. Not generation, sir, but, as I stated in my testimony, we do not think it would be in the public interest; it would merely add to the cost of power, if we had to build any appreciable transmission lines into the Pacific Gas & Electric Co. and/or the Bureau of Reclamation's existing grid system. We don't think it would make any sense.

MR. BROYHILL. You are saying, in other words, that this legislation would give you leverage or whatever is needed to get an investor-owned system to wheel the power for you? Is that what you mean?

MR. COWDEN. Any that we ourselves generate; yes, sir. At the present time, all of the energy that the preference customers receive from the Bureau is wheeled either over the Bureau's limited grid system or the company's." (at 335)

(iii) Statement of D. Bruce Mansfield, President, Ohio Edison Co. and Chairman of the Board, Pennsylvania Power Co.

"Not only would provisions for direct access of small systems to economies of scale disguise the economic facts and thus tend to alter the effect of economic forces shaping the electric industry, but provisions calling for wheeling and displacement transactions would change a fundamental concept of the industry. The provisions of Section 6(f)

would turn large electric utilities into common carriers. Section 6(f) requires such utilities to make capacity on their transmission lines available to small systems by means of wheeling, displacement transactions, and other exchanges.

* * *

The usual rationale that is offered for requesting an electric system to wheel the energy of another electric system is that it would avoid duplication of transmission line facilities. There is more than one way to avoid duplication, however, and wheeling is *not* the better way. The better way is to buy from a neighboring supplier. The FPC regulates the rates of public utilities for wholesale sales so it can hardly be said that the customer is at the mercy of any neighboring supplier under FPC's jurisdiction.

The Commission's existing powers under Section 202(b) of the Power Act are more than adequate to permit all electric systems requiring it to have access to a reliable supply of bulk power. That section authorizes the Commission to order a public utility to interconnect with another and to sell service to such other person.

Without specifically repealing or amending Section 202(b), the proposed Section 6(f) would go far beyond it by permitting one utility to use or even enlarge the transmission system of another. These provisions would not in any way add to the aggregate bulk power supply of the nation, or enhance its reliability. They would simply permit small utilities to seek economic advantages for themselves by utilizing the systems of large utilities on some incremental cost basis, and thus to shift costs from themselves and their customers to the larger system and the customers of the larger systems. This seems to me to be indefensible, either economically or as a matter of policy. Moreover, no protection of service to customers of large systems is afforded by the language of Section 6(f) which omits the

proviso of Section 202(b) that the Commission shall have no authority to compel enlargement of generating facilities for the purpose of establishing a connection and no authority to compel a public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its own customers.

Speaking for one large system, we don't find any consolation in the provisions of Section 6(f) that access should be given on fair and reasonable terms which the Commission will have power to order. For one reason, the example of fair and reasonable terms which is given in the bill is that the terms include access by means of wheeling, etc. In other words, the emphasis is on what small systems—not large systems—are to get." (at 1005-1006)

5. 92ND CONGRESS

a. Proposed legislation:

(i) S. 294, H.R. 605, H.R. 3838 and H.R. 5941 (identical bills to enact Electric Power Reliability Act of 1970; same as 91st Cong., Electric Power Reliability Act of 1969).

(ii) H.R. 6972 (same as 91st Cong., H.R. 12585).

(iii) S. 2324 and H.R. 9970 (identical bills).

b. Pertinent Provisions of S. 2324 and H.R. 9970, § 103(c)(1)(B):

"A regional corporation may not enter into a contract for services with any electric utility unless such utility agrees to permit (at such times and to such extent as such corporation may order) the use of its excess transmission capacity for the purpose of wheeling power from facilities of such corporation or of the National Grid to load centers

of other electric utilities contracting to purchase electric power from such corporation."

c. Excerpts from *Hearings on H.R. 5277 and Other Bills Before the Communications and Power Subcomm. of the House Interstate and Foreign Commerce Comm.*, 92nd Cong., 1st Sess. (1971):

(i) Statement of Congressman John Moss (sponsor of H.R. 3838).

"To encourage abundant and reliable electric supply and to preserve the environment from gross unnecessary desecration, therefore, the size of plants and lines must not be limited by the needs of the company proposing to build them and its customers. Such plants and lines should be large enough to serve entire areas, regardless of the patchwork of individual company franchises within the area.

Our bill, unlike the FPC bill, faces up to this problem. We would provide that if company A proposes to build a smaller plant for its own customers, which if increased in size could serve also the nearby customers of company B, and more economically than either group could be served by separate plants, the FPC can authorize company B to enlarge the plant at its own expense, and can require the two companies to operate the enlarged plant for the common benefit of both groups of consumers.

Our bill includes similar provisions applicable to transmission lines, and in addition would enlarge the jurisdiction of the FPC to require a utility having excess capacity in its existing lines to transmit energy of another person for a reasonable fee.

Electric transmission lines are part of the country's transportation system. Everyone would recognize the absurdity of the situation if our railroads were reserved

for the sole purpose of transporting their owner's own commodities. It would approach madness if the only way a coal company could get its goods to market would be to build its own railroad parallel to an existing underused railroad owned by another coal company.

We have something approaching that lunatic situation in our electric energy transmission system. The bill introduced today will restore reason." (at 170-171, 383)

(ii) Testimony of FPC Commissioner Lawrence O'Connor.

"The third point of basic concern is the use of the bulk power networks of various segments of the electric utility industry, investor owned, publicly owned and cooperatively owned. If we are to avoid the duplication of facilities through a nation-wide certification process, and thereby restrict what a particular utility may or may not construct, there must be authority in a regulatory body to direct the use of one utility's (federal, state, investor owned or cooperatively owned) transmission networks by another. I have reference to Section 6(f) of H.R. 6972. The granting of such authority is the 'other shoe' to the granting of certification power as I view the whole matter." (at 589)